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**REPORTS**  
**OF**  
**CIVIL AND CRIMINAL CASES**  
**DECIDED BY THE**  
**COURT OF APPEALS**  
**OF KENTUCKY**

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**VOLUME VI**

**ROBERT G. HIGDON, Reporter**

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**VOL. 154 KENTUCKY REPORTS**

**CONTAINING CASES DECIDED FROM**

**MAY 22, 1913, TO SEPTEMBER 30, 1913**

---

**FRANKFORT, KY.**  
**THE STATE JOURNAL CO.**  
**1913**

JAN 15 1914

# JUDICIAL OFFICERS OF THE STATE

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## COURT OF APPEALS OF KENTUCKY

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(As constituted during the period covered by this volume from  
May 22, 1913, to September 30, 1913.)

HON. J. P. HOBSON, Chief Justice.

### ASSOCIATE JUSTICES

HON. JOHN D. CARROLL,

HON. JOHN M. LASSING,

HON. T. J. NUNN,

HON. W. E. SETTLE,

HON. SHACKELFORD MILLER,

HON. C. C. TURNER,

HON. WM. ROGERS CLAY, Commissioner.

### OFFICERS OF THE COURT.

JAMES GARNETT, Attorney General,

CHARLES H. MORRIS, First Assistant Attorney General,

M. M. LOGAN, Second Assistant Attorney General,

O. S. HOGAN, Third Assistant Attorney General,

ROBERT G. HIGDON, Reporter Court of Appeals,

ROBERT L. GREENE, Clerk Court of Appeals.

# JUDGES OF CIRCUIT COURTS

ELECTED NOVEMBER 2, 1909, FOR A TERM OF SIX YEARS,  
BEGINNING THE FIRST MONDAY IN JANUARY, 1910.

---

1st District—R. J. BUGG.....	Bardwell
2nd District—W. M. REED.....	Paducah
3rd District—J. T. HANBERRY.....	Hopkinsville
4th District—J. F. GORDON.....	Madisonville
5th District—J. W. HENSON.....	Henderson
6th District—T. F. BIRKHEAD.....	Owensboro
*7th District—JOHN S. RHEA.....	Russellville
8th District—McKENZIE MOSS.....	Bowling Green
9th District—J. R. LAYMAN.....	Elizabethtown
10th District—SAMUEL E. JONES.....	Glasgow
11th District—I. H. THURMAN.....	Springfield
12th District—CHARLES C. MARSHALL.....	Shelbyville
13th District—CHARLES A. HARDIN.....	Harrodsburg
14th District—R. L. STOUT.....	Versailles
15th District—J. W. CAMMACK.....	Owenton
16th District—F. M. TRACY.....	Covington
16th District—M. L. HARBESON.....	Covington
17th District—CHAS. W. YUNGBLUTH.....	Newport
18th District—L. P. FRYER.....	Butler
19th District—C. D. NEWELL.....	Maysville
20th District—WM. C. HALBERT.....	Vanceburg
21st District—ALLIE W. YOUNG.....	Morehead
22nd District—CHARLES KERR.....	Lexington
23rd District—HUGH RIDDELL.....	Irvine
24th District—A. J. KIRK.....	Paintsville
25th District—J. M. BENTON.....	Winchester
26th District—W. T. DAVIS.....	Pineville
27th District—WM. LEWIS.....	London
28th District—B. J. BETHURUM.....	Somerset
29th District—J. C. CARTER.....	Tompkinsville
30th District—JAMES QUARLES (Chy. 1).....	Louisville
30th District—SAMUEL B. KIRBY (Chy. 2).....	Louisville
30th District—WM. H. FIELD (Com. Pleas 1).....	Louisville
30th District—THOS. R. GORDON (Com. Pleas 2).....	Louisville
30th District—WALTER P. LINCOLN (Com. Pleas 3).....	Louisville
30th District—W. M. SMITH (Com. Pleas 4).....	Louisville
30th District—JAMES P. GREGORY (Crim. Div.).....	Louisville
31st District—D. W. GARDNER.....	Salersville
32nd District—J. B. HANNAH.....	Sandy Hook
33rd District—L. D. LEWIS.....	Hyden
34th District—FLEM D. SAMPSON.....	Williamsburg
35th District—J. F. BUTLER.....	Pikeville

---

Appointed August 12, 1913, to fill vacancy caused by the resignation of  
Judge Sandidge.

## COMMONWEALTH ATTORNEYS,

ELECTED NOVEMBER 2, 1909, FOR A TERM OF SIX YEARS,  
BEGINNING THE FIRST MONDAY IN JANUARY, 1910.

---

1st District—R. L. SMITH.....	Clinton
2nd District—JNO. G. LOVETT.....	Benton
3rd District—DENNY P. SMITH.....	Cadir
4th District—JNO. L. GRAYOT.....	Smithland
5th District—S. V. DIXON.....	Henderson
6th District—BEN D. RINGO.....	Owensboro
7th District—J. R. MALLORY.....	Elkton
8th District—JNO. H. GILLIAN.....	Scottsville
9th District—CLAUDE MERCER.....	Hardinsburg
10th District—F. E. DAUGHTERY.....	Bardstown
11th District—C. S. HILL.....	Lebanon
12th District—CHAS. H. SANDFORD.....	New Castle
13th District—EMMETT PUYEAR.....	Danville
14th District—V. F. BRADLEY.....	Georgetown
15th District—M. L. DOWNS.....	Carrollton
16th District—R. G. WILLIAMS.....	Covington
17th District—WM. A. BURKAMP.....	Newport
18th District—JAS. C. DEDMAN.....	Cynthiana
19th District—M. J. HENNESSEY.....	Augusta
20th District—J. B. WILHOIT.....	Ashland
21st District—W. B. WHITE.....	Mt. Sterling
22nd District—JNO. R. ALLEN.....	Lexington
23rd District—THOS. C. JOHNSON.....	Tallega
24th District—ISAAC G. RICE.....	Paintsville
25th District—B. A. CRUTCHER.....	Winchester
26th District—J. G. FORRESTER.....	Harlan
27th District—J. C. CLOYD.....	Manchester
28th District—M. L. JARVIS.....	Somerset
29th District—A. A. HUDDLESON.....	Burksville
30th District—JOS. M. HUFFAKER.....	Louisville
31st District—WM. H. MAY.....	Prestonsburg
32nd District—J. W. WAUGH.....	Grayson
33rd District—IRA FIELDS.....	Hazard
34th District—JOSEPH B. SNYDER.....	Williamsburg
35th District—R. M. FIELDS.....	Whitesburg

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**DECISIONS**  
**OF THE**  
**Court of Appeals of Kentucky**

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**SPRING TERM, 1913**

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**Wilson v. Hoover, et al.**

(Decided May 22, 1913.)

Appeal from Ohio Circuit Court.

1. **Deeds—Construction—Distinct Interests or Titles.**—A deed, purporting to convey the undivided interest of the grantor in and to the lands therein described, passes all interest of every character, then owned or claimed by the grantor, in said lands.
2. **Adverse Possession—Tenancy in Common—Limitation of Actions.**—As a general rule, the possession of one cotenant is amicable and not adverse to that of another cotenant, but such possession may be adverse and, if continued uninterruptedly for fifteen years, will ripen into a perfect title.
3. **Limitation of Actions—Adverse Possession—Notice—Tenancy in Common.**—To set the statute of limitations in motion in favor of one cotenant against another, actual notice of adverse holding, or such open and notorious claim of ownership or exercise of such claim of right as to justify the inference of adverse possession, must be brought home to the disseized cotenant.
4. **Partition—Action—Evidence—Weight and Sufficiency—Limitation of Actions—Adverse Possession—Tenancy in Common.**—In an action for the partition of lands by a vendee of a cotenant against other cotenants, or those holding under them, evidence held sufficient to support the pleas of adverse possession and limitation of actions.

**SWEENEY, ELLIS & SWEENEY** for appellant.

**BARNES & SMITH** for appellees.

**OPINION OF THE COURT BY JUDGE LASSING—Affirming.**

Dan. T. Wilson filed suit in the Ohio Circuit Court against L. S. Hoover and others, in which he sought to

be adjudged the owner of an undivided twenty-one, one-hundredths interest in 214 acres of land in said county. He alleged that the defendants owned seventy-nine one-hundredths remainder interest in said land, and prayed for its partition, or a sale and division of the proceeds if it should be found not to be susceptible of division. The defendants filed their separate answers, in which they each asserted title to a portion of the land described in the petition and denied that the plaintiff had any title to or interest in the portions so claimed by them. The defendants conceded that plaintiff owned a tract of about twelve acres, which was described in the boundary set up by him in his petition. They pleaded further that, on November 21, 1890, the entire boundary described in the petition was claimed by and in the possession of L. S. Hoover and wife, J. R. St. Clair and E. D. Ford; that on said date they caused it to be surveyed, and partitioned it among themselves, Hoover and wife taking 53 acres, St. Clair 80 acres, and Ford 12 acres; that they each then and there acquiesced in said division; that Hoover and wife, who were then on the land allotted to them, put it under fence and have ever since been continuously in possession of their part; that St. Clair was likewise possessed of his portion, having fenced and held it in uninterrupted possession until 1892, when he sold it to J. H. Wilson, who took immediate possession, and he and his vendees have ever since been in the undisputed possession of all of said 80 acres; and that said E. D. Ford sold the twelve acres so allotted to him to Z. A. Wilson, a son of plaintiff, and that later Z. A. Wilson sold and transferred it to his father, who now owns it. The case was prepared for trial on the question of title and, upon consideration, the chancellor was of opinion that the plaintiff was not entitled to the relief sought and dismissed his petition. He appeals.

The pleadings are quite voluminous, and the issue is very much complicated by the injection into the record of much irrelevant and redundant matter. This land was a part of a tract of 262 acres owned by Robert Wilson. In his lifetime, he sold off forty acres, and in 1870 died the owner of the remaining 214 acres. He left a will by which he gave his widow a life estate in all of said land during her widowhood, with remainder to ten of his thirteen children, naming them. His widow never married again, and died in March, 1894. A few years before her death, she sold a life interest in a part of

said land to L. S. Hoover, and later, either sold the balance to J. R. St. Clair or placed him in possession of it under an agreement by which he was to provide her a support during the remainder of her life. A year or so before her death, she moved away from the farm and never thereafter lived upon it.

Several of the Wilson children, to whom their father devised a remainder interest in the farm, sold their undivided interest to their brother James, and the record is reasonably clear that, in this way, he acquired a five-tenths interest in said land. He owned, by devise, a one-tenth interest, so that he owned at least six-tenths of said land. He sold and conveyed his interest to Joseph Ford. Ford, it appears, purchased another interest, giving him at least seven-tenths of the entire tract. Two of the other Wilson children sold their interest to one Job S. Arnold, and Arnold sold these interests, so acquired by him, to appellant, Dan T. Wilson, describing the land covered by his conveyance as his undivided interest in the Robert Wilson farm. In 1879, Joseph Ford conveyed to his children, ten in number, all of his interest in the Robert Wilson lands, but did not describe in the deed the extent of such interest. There is no record evidence that Catherine Wilson ever disposed of her one-tenth interest in her father's estate. She married one Golson Phelps, by whom she had two children, J. R. Phelps and Zelma Phelps who married one George M. Tucker. She died in 1910 without ever having asserted her right to this property, although she lived more than forty years after the probate of her father's will devising it to her. There was no dispute between the parties to this litigation, at the time the petition was filed, as to the interest of any of the Wilson heirs in or to said land, for at that time appellant, Dan T. Wilson was not claiming any interest through, or by virtue of, any purchase from any one of the Wilson heirs. On March 10, 1911, he purchased from Zelma Tucker and her husband an undivided one-half interest in one-tenth of said land, which her mother, Catherine Wilson Phelps, should have received in the division of her father's estate. After his purchase of this undivided one-half of one-tenth he filed an amended petition asserting claim to this interest. J. R. Phelps who was made a defendant answered claiming an undivided one-half of one-tenth interest in the Robert Wilson land, as heir-at-law of his mother, Catherine Wilson Phelps; he

made his answer a cross-petition against his co-defendants and joined in the prayer of the petition. Appellees took issue with him on the question of his claim of ownership and, upon final hearing, his answer and cross-petition was dismissed. As he has prosecuted no appeal, it is unnecessary to notice further this branch of the case.

Each of the Ford children owned an undivided one-tenth of seven-tenths, or seven one-hundredths of the Robert Wilson tract. Appellant claimed, in his original petition, the interest of N. H. Ford, Lucinda Myers and E. D. Ford, twenty-one one hundredths in all. Appellees conceded that he owned the E. D. Ford interest, but asserted that it was not an undivided interest, but that, in the division made in 1890, his interest had been cut off and allotted to him, and the deed, under which appellant asserts title to this interest calls, not for an undivided interest but for twelve acres and this twelve acres is described by metes and bounds; hence, the only controversy is over the N. H. Ford and Lucinda Myers interests.

Appellant claims that on March 5, 1888, he caused the undivided interest of N. H. Ford in the Wilson and other lands which he had inherited from his father, to be sold under execution in satisfaction of a judgment debt, and that he, at said sale, became the purchaser of the interest of N. H. Ford in the Wilson land. He took no further steps to invest himself with title to this interest until 1910, when, on September 13, he caused the sheriff of Ohio county to make a deed to him for said interest, under and by virtue of his purchase. Appellee, Hoover, insists that, at the time of said sale, he forbade the sale of the land, claiming that he had theretofore purchased it of N. H. Ford and was then in possession of same. The conduct of appellant rather confirms the claim of appellee, Hoover, for, while admitting that he knew that Hoover was, during all this time, living upon and claiming the land, appellant took no steps, for more than twenty years, to invest himself with paper evidence of title to the property. We are not limited, however, in determining appellant's rights in this particular, to a consideration of the claim of appellee, Hoover, and this defense may be waived, for, upon examining the record, we find that the sheriff's sale, under which appellant claims to have acquired title to the interest of N. H. Ford in this land, was made on March 5, 1888, and on February 2, 1889, he sold and

conveyed to his son-in-law, J. R. St. Clair, his undivided interest in the Robert Wilson land. He insists that, by this conveyance, there passed to his son-in-law only that interest for which he then had paper title. The deed does not so state. It calls for his undivided interest, and undoubtedly passed all interest of every kind and character, which the grantor then owned or claimed in the land described in the deed. If there was any mistake in the execution of this deed or fraud in its procurement, appellant had five years from the discovery of the mistake or fraud, or at most, ten years from the date of the execution of the deed, to have it corrected. The time within which he might have availed him of such right, if any he had, having long since passed, such plea would now be of no avail. Evidently this claim on the part of appellant to the interest of N. H. Ford is the result of an afterthought and is wholly without merit.

Appellant's claim to the Meyers tract arose in this way: He alleges that his son-in-law, J. R. St. Clair, bought the Myers interest in September, 1889, and thereafter sold and transferred it to him by assignment, and he procured a deed for this tract on June 12, 1911, after the institution of this suit. This claim occupies very much the same position as does his claim to ownership of the N. H. Ford tract, for St. Clair in 1892, two years after the division of the land between himself, Hoover, and E. D. Ford, sold and conveyed his interest in the Robert Wilson land to J. H. Wilson, who was the oldest son of Dan., and J. H. Wilson took possession under this conveyance and he and those claiming under him have held it ever since. Now, if it be conceded that St. Clair did, in fact, buy the Myers interest, it was evidently taken into account at the time of the division, and when he sold his interest in the Robert Wilson land, this Myers interest passed under his deed, and his father-in-law acquired nothing by reason of the assignment and transfer of the title bond to him many years after St. Clair had parted with any interest that he had in this land. The record, which appellant, his son, and son-in-law made at a time when there was no question of ownership involved, is a complete bar to the claim attempted to be asserted here on the part of appellant to the interest of N. H. Ford and Lucinda Myers in the Robert Wilson farm.

The only question giving us any concern is whether or not limitation had run against Catherine Wilson

Phelps, depriving her of her interest in the Robert Wilson farm. A determination of this question depends upon whether or not the possession of the occupying claimants, although cotenants with her, was adverse to her. As a general rule, the possession of one cotenant is amicable and not adverse to that of another cotenant. But, there are many exceptions to this rule, and it is well recognized in this State and elsewhere that the possession of a cotenant may be adverse or hostile to other cotenants and, if continued for fifteen years or more, will ripen into a perfect title. The exception to this rule is stated by the author in 1 Cyc. 1072, as follows:

"While the general rule is as stated, it is well settled that one tenant may hold adversely to his co-tenant, and if his possession is continued uninterruptedly for the statutory period he will acquire an indefeasible title; and this is true whether the original entry was with intent to hold adversely or whether the entry was as tenant in common."

Gillaspie v. Osburn, 3 A. K. Marsh., 77 and Larman v. Huey, 13 B. Mon., 436 are cited by the author in support of the text.

As to the necessity of knowledge or notice of the fact of adverse holding, the same author, in 1 Cyc., 1073, citing in support of the text Gossam v. Donaldson, 18 B. Mon., 230, and Ward v. Ward, 15 Rep., 706, 25 S. W., 112, says:

"In order to constitute a disseizin of a cotenant the fact of adverse holding must be brought home to him either by information to that effect, given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the cotenant that an adverse possession and disseizin are intended to be asserted. Actual verbal or written notice is not, however, necessary; adverse possession may be inferred from outward acts, open and notorious claim of ownership, and exercise of exclusive right." \* \* \*

In Bloom v. Sawyer 121 Ky., 308, an owner of an undivided three-fourths of a tract of land died, leaving a widow to whom dower was set apart. The widow conveyed her dower right to one who conveyed it to another, and he conveyed by deed, without warranty, the whole tract in fee simple. The grantee in the latter deed took possession of the whole tract and continuously claimed the property adversely as his own. The court there

held that the entry of a person on land under a conveyance which purports to dispose of the whole, though the grantor is but a joint tenant, is an entry of the whole in severalty and is adverse to the other tenants, and possession under such deed was sufficient to set the statute of limitation in motion against the cotenants.

There is no question that, at the time this land was divided in 1890, Hoover, St. Clair, and E. D. Ford were in possession and claiming all of it, and there is no evidence whatever to the effect that, at that time, any of them knew that Catherine Wilson Phelps owned an interest in this land. So that, at the time the division was made, it is undoubtedly true that they were claiming this land, whether they, in fact, owned it or not. It is likewise true that, under such claim of ownership, they proceeded to and did divide and partition it among themselves, causing it to be surveyed and each exercising such acts of ownership as one might exercise over land belonging to him. With the exception of E. D. Ford, they built upon it, cultivated it, cut timber from it, paid the taxes on it, and publicly and openly claimed as their own, and it was recognized as such by persons living in that community.

Were these acts on the part of appellees, and their predecessors in title, sufficient to put Catherine Wilson Phelps upon notice that their claim was hostile to hers? We are of opinion that they were. Appellees' possession was certainly as notorious and open as it could have been made, without giving to Catherine Wilson Phelps actual notice that they were claiming the land and were not recognizing her right to an interest in it. As a matter of fact, there is no evidence whatever that she, at any time, asserted or claimed to have such right, and her conduct leads rather to the conclusion that, at some time during the twenty years following the probate of her father's will and the division of this land, she had sold or disposed of her interest therein. Having lived in that vicinity and being of sound mind, her conduct is difficult of explanation upon any other theory, but whether she had sold it or not, we are of opinion that the conduct of appellees is such as must have apprised a person of ordinary intelligence that they were not recognizing the right or title of any one else in and to those portions of the land in controversy, which were held by them. This being true, we would hold that, were the claim of ownership now being asserted by Catherine

Wilson Phelps instead of appellant and her son, she had lost it by reason of the lapse of time. Her children could acquire no greater right than she had, and on the state of the record the chancellor was justified in holding that appellant had failed to make out a case.

Judgment affirmed.

### **First National Bank of Louisville v. Bickel, et al.**

(Decided May 22, 1913.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Second Division).

1. **Contracts—Construction of.**—A contract obligating the signers to "guarantee an overdraft to the First National Bank to the extent of \$4,500; all the receipts of the White City Co. to be deposited in the bank until the above is extinguished," was not a continuing guaranty but a guaranty of an existing overdraft.
2. **Contracts—Extrinsic Evidence to Show Meaning of.**—Where a written contract is not open to two or more constructions, the rights and liabilities of the parties under it are to be determined by the paper alone, and its meaning cannot be extended or modified by extrinsic evidence.
3. **Banks—Rights and Liabilities of Officers of a Bank Who Sign a Guaranty to it.**—The liability of bank officers who sign a paper guaranteeing to it the payment of a note, is not increased by their relation with the bank. They are to be treated as other customers dealing with the bank.

HELM BRUCE, BRUCE & BULLITT for appellant.

B. F. WASHER, W. PRATT DALE for appellees.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

On July 6, 1908, the appellee, C. C. Bickel, and the other appellees, all of whom were at that time financially interested in a corporation known as the White City Company executed and delivered to the appellant bank the following writing:

"We, the undersigned, hereby guarantee an overdraft to the First National Bank of Louisville, Ky., to the extent of \$4,500; all the receipts of the Park (White City Company) to be deposited in said bank until the above is extinguished. It is also understood and agreed that chairs located in the theatre, bought from the Ross Chair



Company, to the value of \$1,500, are hereby assigned to us as security by the directors of the White City Company."

Some months after this the White City Company made an assignment owing an overdraft to the bank of more than six thousand dollars, but between July 6, 1908 and the date of the assignment the receipts of the White City Company deposited in the bank amounted to largely more than \$4,500.

Afterwards, this suit was brought by the bank against the signers of the guaranty to recover from them \$4,500, the amount mentioned in the guaranty. A general demurrer filed to the petition as amended was sustained, and, the bank declining to plead further, its petition was dismissed.

The suit was predicated upon the theory that the paper was a continuing guaranty of an overdraft to the extent of \$4,500, and therefore as the account of the White City Company was continually overdrawn from the date of the execution of this guaranty to the time it became bankrupt, on which date the overdraft amounted to more than six thousand dollars, the guarantors were bound on the guaranty to the extent of \$4,500. On the other hand, the position of the guarantors is that they only guaranteed an overdraft existing at the time the guaranty was executed to the extent of \$4,500, coupled with an agreement on the part of the bank to apply the receipts of the company thereafter deposited in the bank to the extinguishment of the then existing overdraft, and as subsequent to July 6, 1908, the receipts of the White City Company deposited in the bank amounted to more than \$4,500, the guaranty was satisfied and the guarantors released from liability.

As the guaranty does not seem fairly open to two constructions, the solution of the question at issue between the parties must turn on the proper construction of the guaranty as it is written, without the aid of extrinsic evidence, and, looking to the paper alone, we think the guarantors only guaranteed the payment of an existing overdraft and that the obligation on their part was not a continuing guaranty. The words of the guaranty exclude the construction that it was intended to be a continuing guaranty. The stipulation, that the receipts of the Park (White City Company) were to be deposited in the bank to satisfy the overdraft guaranteed, plainly shows that the parties had in contemplation an overdraft then exist-

ing to the payment of which the bank agreed to apply deposits until it was satisfied.

If, as insisted by counsel for the bank, this paper was a continuing guaranty and not a guaranty of an existing overdraft, it is difficult to understand the reason for inserting in the paper the stipulation that the receipts of the White City Company should be applied to the payment of the overdraft until it was extinguished. In our opinion, to construe this paper as a continuing guaranty would do violence to the expressed intention of the parties and result in ignoring the condition obligating the bank to apply the receipts in a specified way.

It is, however, argued in behalf of the bank that the condition of the bank account of the White City Company on July 6 shows that the guaranty was intended to be a continuing one and did not have reference to an existing overdraft of \$4,500. Waiving the question as to the competency of the account as an aid in the construction of a paper that on its face seems free from ambiguity, we do not think the condition of the account sustains the conclusion reached by counsel. The account shows that on July 2nd, the overdraft was \$5,044.77, and that on July 3d, the overdraft was \$4,623.08, and that on July 4th and 5th it was \$5,081.64. It further shows that on July 6th there was deposited \$3,182.30, leaving an overdraft at the close of business on July 6th of \$1,899.34, and the argument is made that when this guaranty was executed the overdraft only amounted to \$1,899.34, and therefore the reference in the guaranty to an overdraft of \$4,500 could not refer to an existing overdraft, as there was no existing overdraft in that amount. Whether there was an overdraft of \$4,500 when this guaranty was executed, depends on the time of day on July 6 that it was executed, because in the morning of that day, and at all times on that day before the deposit of \$3,182.30 was made, there was an overdraft of more than \$4,500, and it is reasonable to assume that this paper was executed before this deposit was made.

It is further suggested by counsel that if the paper was executed before the deposit had reduced the overdraft, it is singular that the paper, which was intended to only guarantee an existing overdraft, did not specify the amount of the overdraft then existing, which was \$5,081.64, instead of specifying \$4,500. The record does not show, and we have no means of knowing what influenced the guarantors to fix the amount for which they

were willing to become liable at \$4,500, but whatever the reason was, they had the right to insert any sum they pleased, and the motives that influenced them to specify \$4,500 are not the subject of pertinent inquiry.

In reference to the assertion of counsel for the bank that the signers of the guaranty who were also officers of the bank are estopped from denying that this was a continuing guaranty, it seems sufficient to say that as there is no claim of fraud or mistake in the execution of the paper, its terms and conditions cannot be extended or modified by a construction that would give it a meaning that the language employed is not fairly susceptible of. Aside from this, we are unable to perceive how the fact that some of the signers of the guaranty were officers of the bank could have the effect of estopping them from denying that the paper upon which it is sought to hold them liable, was not a continuing guaranty. In signing the paper they were not acting as officers of the bank but were dealing with it as customers, and the relation they held with the bank does not in any manner affect their rights as signers of this paper.

The judgment is affirmed.

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## **First National Bank of Louisville v. Bickel, et al.**

## **First National Bank of Louisville v. Bickel, et al.**

(Decided May 22, 1913.)

### **Appeals from Jefferson Circuit Court (Common Pleas Branch, First Division).**

1. **Practice—Right of Court to Set Aside Consent Orders and Judgments.**—When the ends of justice require it, the court in which an order or judgment is entered, although it be by consent, may set it aside upon the motion of either of the parties if the motion is made while the court has control of the order or judgment, but before the court sets aside a consent order or judgment the party asking that it be done should present good and sufficient reasons therefor.
2. **Practice—Civil Code—Section 333—Construction of—Waiver.**—Section 333 of the civil code providing in substance that objections and exceptions must be made and taken by a complaining party before he will be heard afterwards to object to an order or ruling of the court, do not apply with the same binding force in the court in which the ruling or order is made as they do in this court. The court in which the order or judgment is made may

for good reasons set it aside, although it is entered by consent or without objection; but a party who brings his case to this court cannot avail himself here of erroneous rulings or orders made in the lower court unless he has, in the manner pointed out in section 333, saved an exception or an objection to the order or ruling he complains of.

3. Bills and Notes—Endorsers.—A person who places his name upon commercial paper other than as maker, drawer or acceptor is deemed to be an endorser, unless he indicates by proper words in the endorsement his intention to be bound in some other capacity.
4. Banks—Vice-President Not Responsible If Notice of Dishonor of Paper Is Not Given.—The vice-president of a bank by virtue of his office is not charged with the duty of seeing that notice of the dishonor of paper is given to the person entitled thereto, or liable in any manner if he fails to do so.
5. Banks—When Bank Officer Estopped to Deny Liability on Paper Because Notice of Its Dishonor Not Given.—Where an officer of a bank is one of the signers of commercial paper executed to the bank, he is entitled to notice of the dishonor of the paper to the same extent as if he was not connected with the bank, unless it was his duty as an officer of the bank to give such notice; and if it was, he will be estopped to plead want of notice as a defense to a suit by the bank against him.

BRUCE & BULLITT and HELM BRUCE for appellant.

B. F. WASHER, W. PRATT DALE, C. H. SHEILD and KOHN,  
BINGHAM, SLOSS & SPINDLE for appellees.

#### OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

These two appeals presenting the same questions of law will be disposed of in one opinion.

On April 12, 1907, the White City Co., by its president, executed and delivered to the First National Bank a demand note for \$5,000, which was endorsed by the appellees. On May 29, 1907, the same parties, with a few exceptions, signing the paper in the same manner, executed to the bank a note for \$5,000 due in sixty days, and on June 21, 1907, the same parties, with a few exceptions signing the paper in the same way, executed a note to the bank for \$10,000 due in forty days.

In November, 1908, the bank brought three separate suits on these notes, and it appears that substantially the same motions, demurrers and answers were presented by the defendants in each case. No evidence was taken in either case, and in April, 1909, a general demurrer was sustained to the petition filed on the note

that was executed on May 29, 1907, and the petition dismissed. From the judgment dismissing the petition the bank prosecuted an appeal to this court, and in May, 1911, the judgment of the lower court was affirmed by this court in an opinion that may be found in 143 Ky., 754. On October 7, 1911, the mandate from this court was filed in the lower court and upon the filing of this mandate there was entered in each of the other two cases which had remained on the docket in the same condition as they were when the judgment dismissing the petition was rendered in the case appealed to this court this order:

"The issues involved in this action having been heretofore determined against the plaintiff in action No. 52914, First National Bank v. C. C. Bickel, this cause is now dismissed. It is therefore considered by the court that the defendant recover of the plaintiff his costs herein expended and may have execution therefor."

At this point we may digress a moment to say that it is evident that the two actions in which this order of dismissal was made were left pending on the docket for the purpose of entering such a judgment in these cases as might be authorized by the opinion of this court in the appealed case, and so when the mandate in the appealed case was issued affirming the judgment of the lower court, the order of dismissal in the two cases now before us was entered.

It appears, however, that after this order of dismissal was entered, counsel other than those who then represented the bank were employed, and in December, 1911, and within sixty days from the order of dismissal, the new counsel for the bank entered a motion in behalf of the bank to set aside the orders of dismissal, in each case and at the same time tendered an amended petition. But the lower court refused to set aside the orders of dismissal or to allow the amended petitions to be filed, and from the ruling of the court these appeals are prosecuted.

Quite a good deal is said in argument by counsel for both parties as to the effect of the orders of dismissal entered on October 7, 1911, counsel for the bank insisting that the bank was not estopped from asking that these orders be set aside, while counsel for Bickel and others contend that these orders were in effect agreed orders and therefore the bank was estopped from asking that they be set aside. Looking at these orders

as they stand without reference to any custom or practice prevailing in the Jefferson Circuit Court, it would appear that these orders were made by consent or agreement of counsel representing both parties as no objection was taken or exception saved. But if we should treat them as consent orders, we do not think they operated to conclusively estop the bank from asking that they be set aside while the court had control over them, as the Jefferson Circuit Court did at the time the motion to set aside was made, or that the court entering these orders was without power, upon a proper showing to set them aside within the time mentioned.

Ordinarily a party who agrees or consents to the entry of an order or judgment will not afterwards be heard to complain of it or allowed to have it set aside. But this rule of practice is not without exceptions. When the ends of justice require it, the court in which an order or judgment is entered, although it be by consent or agreement, may set it aside upon the motion of either of the parties if the motion is made while the court has control of the order or judgment. In other words, a consent order or judgment is not conclusively binding, and does not work an absolute estoppel on the party consenting to it. But before the court will set aside a consent order or judgment, the party asking that it be done should present good and sufficient reasons therefor, and if it appears that injustice or wrong would result from a failure to set aside the order, and further appears that substantial rights of the adverse party arising since the consent order was entered and as a result of it, will not be prejudiced by setting aside the order, the court should grant the request.

Section 333 of the civil code, providing in substance that objections and exceptions must be made and taken by a complaining party before he will be heard to afterwards object to an order or ruling of the court, do not apply with the same binding force in the court in which the ruling or order is made as they do in this court. As we have stated, the court in which the order or judgment is made and entered may for good reasons set it aside upon motion made within proper time, although the order sought to be set aside was entered by consent or without exception or objection by either party. But a party who brings his case to this court cannot avail himself here of erroneous rulings or orders made in the lower court unless he has, in the manner pointed out in

section 333, saved an exception, or an objection and exception, as the case may be, to the order or ruling he complains of. A party will be conclusively presumed on appeal to have consented to such rulings and orders as he did not except or object to, and therefore will not be heard to complain of them for the first time in this court.

The reason for this rule of practice is obvious and has often been referred to in the opinions of this court. If a party in the circuit court could, by failing to make objections or save exceptions, thus lull his adversary into security, and also deprive the trial court of an opportunity to correct errors to which its attention was called, and avail himself of the objection for the first time in this court, he would be permitted to place his adversary at a great disadvantage as well as materially obstruct the speedy disposal of cases.

For this, as well as other reasons that we might suggest, the uniform practice is not to allow a party to make for the first time in this court an objection that should have been made in the trial court. As illustrative cases on this subject we refer to *Branson v. Commonwealth*, 92 Ky., 330; *Louisville & Nashville R. R. Co. v. Graves*, 78 Ky., 74; *Loving v. Warren County*, 14 Bush, 316; *Buckles v. Commonwealth*, 113 Ky., 795. But in the cases before us we think the court properly refused to set aside the orders of dismissal because the reasons for asking that it be done, which appear in a resolution adopted by the directors of the White City Co., and an amended pleading tendered with the motion to set aside the order, did not make any substantial change in the issues as presented in the 143 Ky., case.

For the purpose of showing this, we will now consider more in detail the things that it is said distinguish these cases from the 143 Ky. case. It is first insisted that a resolution adopted by the board of directors of the White City Co., on the faith of which the three notes were executed to the bank, was not relied on or made a part of the record in the 143 Ky. case, and the argument is made that this resolution estops the appellees from making the defense that they were only endorsers of the paper and not sureties. The resolution reads: "Be it resolved by the board of directors of the White City Co. that the president of the White City Co. be authorized to borrow \$15,000, and that the board of directors of the White City Co. sign the note for security of

the money and pledge the first receipts of the White City Co. to liquidate this deal."

The pertinent part of each of the notes executed to the bank, reads as follows: "We promise to pay to the order of First National Bank, Louisville, Ky., \$. . . . . value received, negotiable and payable at the office of First National Bank of Louisville, Ky., and hereby pledge as security therefor, and as security for any other debt or liability we may now or hereafter owe or be under to said bank the receipts of the White City Co., as per resolution herewith attached."

In the 143 Ky. case the bank charged in its petition that the appellees signed the notes as sureties and not as endorsers, and therefore were not entitled to notice of the dishonor of the paper; and it was further contended that the fact that they did sign as sureties might be shown by parol evidence. But in rejecting this view, we said that under the Negotiable Instrument Act "A person who places his signature upon an instrument other than as maker, drawer or acceptor is deemed to be an endorser, unless he clearly indicate by proper words in the endorsement his intention to be bound in some other capacity." Section 63 is to be read in connection with section 31, which is as follows:

"The endorsement must be written on the instrument or upon a paper attached thereto. The signature of the endorser, without additional words, is a sufficient endorsement.

"The purpose of the statute is to exclude parol evidence and to make the written instrument control the rights of the parties. The statute fixing the legal effect of the instrument, parol evidence may not be received to give it a different effect."

In short, the ruling of the court in that case was that a person who places his name upon paper other than as maker, drawer or acceptor, is deemed to be an endorser unless he indicates by proper words in the endorsement his intention to be bound in some other capacity, or his intention to be bound in some other capacity than as endorser appears on the paper in connection with and as a part of the endorsement.

It is true the resolution adopted by the board of directors was made a part of the paper executed to the bank, or rather, as appears from the paper, was attached thereto. But neither the resolution nor the note contain any words indicating an intention on the part of the



signers of the papers to be bound in any other capacity than as endorses. If the resolution should be considered in connection with and as a part of the endorsement, it does not show a purpose on the part of the persons who signed the paper to become bound in any other capacity than as endorers. The resolution simply recites that the board of directors of the White City Co. will "sign the note for security of the money," without in any manner indicating whether they would sign the note as makers, drawers, acceptors, sureties or endorers, and that the directors will pledge the receipts of the White City Co. to liquidate the notes, and the notes recite that the signers have pledged the receipts of the White City Co. as security for their payment. Reading both of these papers together, they merely provide that the directors will sign the notes as security for the money advanced and pledge for their payment the receipts of the White City Co., and these conditions do not have the effect of showing that when the directors signed the notes as endorers they intended to become liable as sureties. There are no words either in the resolution or in the notes indicating a purpose on the part of the signers of the notes to become bound otherwise than as endorers, and so the opinion in 143 Ky. is controlling on the question that the signers of this paper should be treated as endorers.

It is further argued for the bank that as the appellee Bickel was a director in and president of the White City Co., and vice-president of the bank, and had actual knowledge the day before the notes matured that they would mature on the next day, and that the White City Co. had no funds with which to pay them, it was his duty as an officer of the bank to see to it that notice of the dishonor of the paper was given to the parties entitled to notice, and that his failure to do this estops him from denying his liability on the paper.

We do not know of any authority, and have not been referred to any by counsel for appellant, holding that the vice-president of a bank is, by virtue of his office alone, charged with the duty of seeing that notice of the dishonor of paper is given to the person entitled thereto or liable in any manner if he fails to do so. Of course the vice-president of a bank or the president or any director, or indeed any other officer or employe might be charged by resolution of the bank or by its habit and custom of dealing with the duty of protesting paper

or giving notice of its dishonor, but there is no showing in these cases that Bickel had ever been authorized by the bank to do these things or that there was any custom of the bank under which he did or should do them; and the vice-president of a bank, simply because he is vice-president, is under no duty to attend to these matters and is not to be held liable for his failure to do so. A state of case also might arise in which the vice-president or other officer of the bank might be held liable for the failure to give notice, as when it was shown that the officer sought to be charged with liability was guilty of fraud or it was shown that he in some manner actively prevented the giving of notice, but we have no such state of case here. It is usual and customary for the cashier of the bank to look after matters of this kind, and in the absence of any showing that it was not the custom of the cashier of the first National Bank to attend to the protesting of paper and the giving of notice of dishonor, we must presume that it was the duty of the cashier to have discharged this duty in respect to these notes.

Nor do we think that the fact that Bickel was an officer of the bank relieved the bank from the necessity of giving him notice. Bickel signed the paper not as an officer of the bank but as an officer of another corporation borrowing money from the bank, and his rights and liability on the paper are precisely the same as those of the other parties who signed it. The statute, requiring that notice of dishonor shall be given, is peremptory, and all persons entitled to the notice are released from liability unless it is given, although they may be connected with the bank, whose duty it is to give notice, as officers or in some other capacity, with the exception that the bank officer whose duty it was to give notice would be of course estopped to plead want of notice as a defense to a suit by the bank against him.

We think the judgment in each case should be affirmed, and it is so ordered.

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### **Connecticut Fire Insurance Company v. Moore.**

(Decided May 22, 1913.)

#### **Appeal from Hickman Circuit Court.**

1. Pleading—Defect—When Cured by Verdict.—The omission of a fact essential to a cause of action will not be cured by the ver-

dict, when there is no admission or proof of the fact, nor submission of the question to the jury.

2. Judgment—Non obstante veredicto—Not Allowed After Motion for a Peremptory Which Should Have Been Sustained.—A party is not entitled to a judgment non obstante veredicto where at the conclusion of the evidence he moves for a peremptory instruction and his motion should have been sustained.
3. Insurance, Fire—Forfeiture for Additional Insurance—Waiver—Evidence.—Evidence that an agent at the time of the taking out of a policy consented to additional insurance is admissible on the question of waiver.
4. Insurance, Fire—Agent—Evidence—Admission.—Proof of knowledge of an insurance agent authorized to solicit insurance and issue policies of additional insurance may be shown by proof of his admission of knowledge made during the continuance of the agency.
5. Evidence—Letter—Proof of Contents—Practice.—Where a letter is in the possession of the adverse party it is the proper practice to give him reasonable notice to produce it, before receiving other proof of its contents.

OLIVER & OLIVER for appellant.

E. M. BRUMMEL, JOSEPH BENNETT and ROBBINS & THOMAS for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Plaintiff, Mona M. Moore, was engaged in the millinery business in the town of Clinton, Kentucky. On March 28, 1911, the Connecticut Fire Insurance Company issued to her a policy insuring her stock against fire in the sum of \$500. During the life of the policy her stock of goods was destroyed by fire. She brought this action to recover the amount of the policy. A trial before a jury resulted in a verdict and judgment in her favor in the sum of \$500. The insurance company appeals.

The first error relied on is the failure of the trial court to sustain the company's motion for a judgment notwithstanding the verdict. The petition sets forth the issuance of the policy, the payment of the premiums, and the fact that the stock of goods was destroyed by fire. It further alleges that the defendant had broken the conditions of its contract in that it had refused and failed to pay plaintiff the full amount of the insurance or any part thereof, although the same had been due since the ..... day of ....., 1911. The petition utterly fails to show the value of the goods destroyed

or to allege that plaintiff sustained any loss under the policy. On the trial the circuit court permitted two witnesses to testify as to the value of the stock destroyed, but instructed the jury that this evidence was admissible only on the question whether the plaintiff herself set fire to the goods or caused some one else to set fire to them. The question of the value of the goods or the loss sustained by the plaintiff was not submitted to the jury. Plaintiff contends that the defect in the petition was cured by the verdict. In the case of *Wilson v. Hunt's Admr.*, 6 B. Mon., 379, it is said: "When the verdict can be fairly considered as establishing between the parties, the very fact which should have been, but is not precisely averred in the declaration, and especially when it clearly appears that that fact was understood by the parties to be the point in issue to be decided by the jury, it would be unnecessary for the ends of justice, and would be worse than useless to send the case back from this court, in order that the declaration should be amended by introducing that fact, and that it should again be presented for the decision of a jury." In the case of *Title Guaranty & Surety Co. v. Commonwealth*, 141 Ky., 570, another statement of the rule is as follows: " \* \* \* where the parties have attempted to join an issue to be tried, and which has been tried, however defective in form the pleadings may be, a verdict for the one or the other will be held to cure such defective pleadings; that is, will cure them as to their form supplying all omitted necessary averments concerning essential facts relied on, provided the proof or admission of such facts was necessarily considered before the verdict could have been rendered. Then, if such facts, when considered as if properly pleaded as to form, do not entitle the party obtaining the verdict to that relief in law, the judgment will be for his adversary. (*Hill v. Ragland, et al.*, 114 Ky., 209)." On the other hand, where there has been a total omission to state a cause of action, or where some fact essential to the cause of action has been wholly omitted, the verdict will not cure the defect. *Drake's Admr. v. Semonin & Dixon*, 82 Ky., 294. In this case the petition did not show that the goods destroyed had any value, or that plaintiff sustained any loss by the fire. There being no allegation of loss, proof of loss was not admissible, and none was admitted for the purpose of showing loss. The only evidence as to the value of the goods destroyed was admitted for an entirely different purpose. No loss

was proved or admitted. The issue of loss or damage to the goods was not submitted to the jury. While we have been very liberal in applying the rule that a verdict will cure a defect in the pleadings, we have never gone to the extent of holding that where the petition fails to state a cause of action or some fact essential to the cause of action, and there is neither an admission nor proof of this fact, nor a submission of the question to the jury, such defect in the petition will be cured by the verdict. Notwithstanding this fact, however, defendant was not entitled to a judgment notwithstanding the verdict. The record shows that at the close of the evidence it asked a peremptory instruction in its favor. As there was neither allegation nor proof of loss, the motion for the peremptory should have been sustained. It is the rule that where a party asks for a peremptory instruction which should have been given, he is not thereafter entitled to a judgment notwithstanding the verdict, but only to a new trial for the error of the court in refusing the peremptory. *Mast, Crowell & Kirkpatrick v. Lehn*, 100 Ky., 464, *Louisville Ry. Co. v. Hibbett*, 139 Ky., 43.

The policy sued on provides that "the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company." The fire occurred on November 24, 1911. Suit was brought on January 22, 1912. Among the defenses interposed by the company was a plea in abatement, based on the fact that suit was prematurely brought. To avoid the effect of this plea plaintiff alleged that before the commencement of the action defendant had denied all liability under the policy, and had thereby waived proof of loss. The proof offered by plaintiff on the question was the testimony of Earnest Reid, who stated that he had read a letter from the defendant to its local agent, J. M. Kemp, denying liability under the policy. Reid made a copy of the letter, and was permitted, over the objection of the defendant, to read the copy. Defendant's agent testified that he delivered the letter to defendant's attorney. Where a party desires to introduce proof of the contents of a letter in the possession of the adverse party, the proper practice is to serve notice on the adverse party to produce the letter. In the event of his failure to do so, other evidence of the contents of the letter is not admissible. *Heilman*

**Milling Co. v. Hotaling**, 21 K. L. R., 950. In this case there was no notice to the defendant to produce the letter, and proof of the contents of the letter should not have been admitted.

The policy contained a provision to the effect that no additional insurance was to be taken out upon the stock of the plaintiff without the consent of the company endorsed on the policy. Plaintiff pleaded a waiver of this provision. Plaintiff proved by herself and one other witness that defendant's local agent not only knew of the additional insurance, but consented thereto. This consent was given at the time the policy herein involved was taken out. In addition to this evidence there was evidence to the effect that knowledge of the additional insurance was brought home to defendant's agent for a considerable time before the fire. It was shown that he admitted knowledge of the additional insurance in the presence of several witnesses. It is insisted that the effect of the evidence that at the time of the negotiations for the insurance defendant's agent was notified of plaintiff's intention to take out additional insurance, and the fact that he said it was all right, is to vary or alter the terms of the written contract without an allegation or proof of fraud or mistake. We do not so construe this evidence. The provision of the contract was admitted; the evidence was offered merely to show a waiver, and it was competent for this purpose.

• It is further insisted that plaintiff had no right to contradict her witness Kemp. Kemp was put upon the stand for the purpose of testifying as to the receipt of the letter from the company in which it denied liability. On cross examination he was asked by counsel for defendant if he had ever given his consent or assent to additional insurance. He replied in the negative. Thereafter plaintiff's counsel asked him when it was that he for the first time heard of the additional insurance. The witness replied that he had never heard of it. He was then asked if he did not know that the additional policy had been issued for at least thirty days before the fire. He answered no. He was then asked if some time before the fire he had not had a conversation with Earnest Reid, in which he told Reid that he knew that a policy of \$500 had been issued by Samuels & Ramsey on the stock of goods. Witness answered in the negative. He was then asked if, during the pendency of the suit, he had not stated in the jury room and in the presence of

Joe Bennett, Mitt Jackson and Bullock Samuels that Bullock Samuels told him some time before that he had insured this stock of goods in the Norwich-Union Fire Insurance Company. Witness answered in the negative. Section 596 of the Civil Code provides that the party producing the witness is not allowed to impeach his credit by evidence of bad character, unless it was indispensable that the party should produce him; but he may contradict him by other evidence and by showing that he has made statements different from his present testimony. Construing this section, it is held that when a party introduces a witness to prove certain facts, and the witness states that they did not transpire, he cannot then introduce other witnesses to prove that the witness had said to them that the facts he had inquired about did transpire. But where a witness states a fact prejudicial to the party calling him, the latter may be allowed to show that the fact does not exist by proving that the witness had made statements to others inconsistent with his present testimony. *Champ. v. Commonwealth*, 2 Metc., 17; *Blackburn v. Commonwealth*, 12 Bush, 181; *Bergman v. Solomon*, 143 Ky., 581. It is argued that defendant's agent in this case simply failed to prove the fact of knowledge, but did not state any fact prejudicial to the plaintiff; therefore; evidence of the fact that he had stated outside of court that he had such knowledge was not competent for the purpose of contradicting him. Whether such evidence was competent to contradict the witness under the foregoing provisions of the Code we deem it unnecessary to decide. In the present case Kemp was defendant's agent entrusted with the duty of soliciting insurance, delivering policies, etc. He was still defendant's agent at the time of the trial. Notice to him of additional insurance was notice to the company. The insurance in question being still in force, and the additional insurance having been obtained during the continuance of the policy in question, and he having authority to waive the additional insurance clause, it was likewise within the scope of his authority to make an admission that was binding both on him and the company; therefore, his statements to the effect that he had received notice of the additional insurance some time before the fire were admissible as substantive evidence.

We find no error in the instructions except that they assume, without allegation or proof to that effect, that plaintiff incurred a loss of \$500.

Upon the return of the case plaintiff will be permitted to amend her petition.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

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### Wade, et al. v. Wade, et al.

(Decided May 23, 1913.)

#### Appeal from Franklin Circuit Court.

**Appeal—Practice—Filing Omitted Portion of Record.**—(Where a case has been reversed to the prejudice of infants upon an incomplete record, and the infants tender, with their petition for a re-hearing, the omitted portion of the record which cures the error for which the judgment was reversed, the supplemental record will be filed and the judgment affirmed upon the record, as completed.

PAUL C. GAINES, guardian ad litem for appellants.

JAMES H. POLSGROVE for appellees.

**RESPONSE TO PETITION FOR REHEARING, BY JUDGE MILLER**—Rehearing Granted and Judgment Affirmed.

The judgment of the lower court was reversed in this case upon the single ground that no *guardian ad litem* had ever been appointed for the infant defendant Mattie Wade. Wade v. Wade, 153 Ky., 619.

Upon this petition for a rehearing the parties, by agreement, have tendered, and moved to file an additional record, which shows that Paul C. Gaines, a regular practicing attorney of this court, was appointed *guardian ad litem* for the infant defendant Mattie Wade by an order entered herein on April 3, 1912. The additional record also contains the affidavit of the Deputy Clerk of the circuit court, showing that the order above mentioned was omitted from the record by mistake and oversight.

In view of the fact that this appeal involves the rights of infants, who should not be called upon to bear the expense of mistakes of others, the motion to file the additional record is sustained; and, as it cures the only error in the record, the petition for a rehearing is granted, and the judgment of the circuit court is affirmed upon the record as now completed.



**Cassidy, et al. v. Drake.**

(Decided May 23, 1913.)

**'Appeal from Fayette Circuit Court.**

1. **Intoxicating Liquors—Licenses.**—A municipality may, by ordinance enacted under statutory authority, not only make it unlawful for one to sell intoxicating liquors on Sundays, election days, or holidays, but may restrict the sale to certain hours of the day time, or require saloons to be closed during the hours of the night.
2. **Licenses—Revocation of.**—A municipality may make it a condition in granting a liquor license, that it shall be revoked by the Mayor if the licensee shall be convicted of violating the ordinance by keeping his saloon open on Sunday.
3. **Licenses—Revocation of—Where a Ministerial Duty.**—Where a municipal ordinance provided that a liquor license should be revoked by the Mayor upon a conviction of the licensee for selling liquor on Sunday, the Mayor performed a mere ministerial duty in revoking the license, and it was not necessary for him to give the licensee notice, or a hearing, before the license could be revoked.
4. **Licenses—Revocation of on Conviction of Bar Tender.**—Where a bar tender appeared in person at the city clerk's office and represented to the clerk that he was the owner of the saloon, and received the license, signing for it in the name of the owner, and executed a bond in the name of the owner, without disclosing the fact that he was the bar tender, and a different person, the conviction of the bar tender for selling liquor on Sunday is sufficient to authorize a revocation of the license which had been taken by the bar tender in the name of the real owner.

J. EMBRY ALLEN for appellants.

WALLACE MUIR for appellee.

**OPINION OF THE COURT BY JUDGE MILLER—Reversing.**

The judgment appealed from in this case perpetually enjoined the appellant J. Ernest Cassidy, Mayor of the City of Lexington, and his subordinate officers, from revoking the saloon license of the appellee, Mrs. L. C. Drake.

Section 123 of the Revised Ordinances of the City of Lexington, makes it unlawful for the keeper of a saloon to keep it open for any purpose, or to permit the sale of liquor therein, on Sunday between the hours of 12 o'clock midnight and four o'clock in the morning, and provides a penalty of a fine of not less than ten dollars nor more than fifty dollars for each offense, and a revocation of his license.

Section 124 of said ordinance further provides that every license issued in pursuance thereto, shall be issued with the distinct agreement, understanding and condition that the same shall be revoked by the Mayor for the violation of any provision of said ordinance.

It is further provided by ordinance, as follows:

"Section 1. Whenever any person, firm, company or corporation conducting a coffee house under a license granted under the ordinances of the City of Lexington, shall be convicted, in a court having competent jurisdiction, of keeping open such coffee house, or permitting therein the sale of beer, ale or spirituous liquors on Sunday or between the hours of 12:30 a. m. and 4:30 a. m. or of permitting any woman to enter such coffee house or loiter around the doors thereof, or of permitting gambling, rioting, or disorderly conduct therein, and a copy of the judgment of conviction be certified to the Mayor, it shall be the duty of the Mayor to revoke said license immediately, and no appeal from such judgment of conviction shall operate to suspend the power of the Mayor to revoke such license.

"Section 2. If the Mayor shall be informed by any citizen, under oath, or by the written statement of any member of the Ways and Means Committee, or of any police officer, that the laws mentioned in Section 1, herein, are being violated by any person, firm, company or corporation or by any employees of any person, firm, company or corporation, in the conduct of any coffee house, it shall be the duty of the Mayor to immediately notify the person, firm, company or corporation so offending, to whom a license has been issued, to appear at his office within twenty-four hours, at a time to be designated in said notice, and show cause, if any, under oath, why such license should not be revoked. If at said hearing, the Mayor shall be satisfied, from the evidence, of the guilt of such offender, it shall be the duty of the Mayor to revoke the license immediately."

In March, 1911, a saloon license was issued to William Drake, who appeared in person at the City Clerk's office of the City of Lexington and represented to the clerk that he was L. C. Drake, who owned the saloon in question. William Drake is the son of Mrs. L. C. Drake. William Drake received the license; signed for it in the name of L. C. Drake, and executed the required bond by signing his name as L. C. Drake, without disclosing the fact that he was William Drake. The license ran for

one year from March 1, 1911. On Sunday, January 28, 1912, William Drake was in charge of the saloon in question as bar tender. It appears from the petition that his mother, Mrs. L. C. Drake, was a non-resident of Kentucky. On the next day William Drake was convicted in the Police Court of the City of Lexington, a court having jurisdiction, of the offense of keeping open said saloon on the preceding Sunday in violation of the ordinance. On January 30, 1912, the fact of said conviction of William Drake was certified to the Mayor, who, pursuant to the authority vested in him by the ordinances above quoted, revoked the license which had been issued to William Drake in the name of L. C. Drake, and thereupon ordered the Chief of Police of the City of Lexington to close the saloon of L. C. Drake. Thereupon L. C. Drake brought this action to enjoin the Mayor and his executive officers from enforcing the forfeiture or closing her saloon; and the injunction having been granted, the Mayor prosecutes this appeal.

The facts are not disputed. The appellee, however, asks that the judgment be affirmed upon two grounds: First, because it is not permissible for the city of Lexington, by an ordinance, to forfeit appellee's liquor license without giving her notice and a hearing of the charge before the proper city officials; and, Secondly, that granting the city might properly so proceed without any hearing other than the criminal proceeding, it could not forfeit the license of the owner of a saloon on the conviction of a bar tender or agent.

1. Lexington is a city of the second class, and subsection 10 of section 3058 of the Kentucky Statutes provides that the general council of cities of the second class may, by ordinance, restrain, regulate and prohibit the sale or giving away of any spirituous, vinous or malt liquors. Subsection 23 of the same statute further provides that the general council may impose, enforce and collect fines, forfeitures and penalties for the breach of any provision in said act, or in any ordinance.

In construing these statutes in *McNulty v. Toof*, 116 Ky., 202, this court held that the City of Paducah, a city of the second class, had the right to pass an ordinance prohibiting the sale of spirituous liquors between the hours of 10:30 p. m. and 5 o'clock a. m., and that such an ordinance was not an unreasonable regulation. There are many cases holding that a municipality may, by ordinance enacted under statutory authority, not only make

it unlawful to sell intoxicating liquors on Sundays, election days or holidays, but may restrict the sale to certain hours of the day time, or require saloons to be closed during the hours of the night. 23 Cyc., 83. The proposition is too well settled to be questioned. *Commonwealth v. McCann*, 29 Ky. L. R., 707, 94 S. W., 645.

Neither do we think there can be any doubt of the city's right to make it a condition in a liquor license that it shall be revoked by the Mayor if the licensee shall be convicted of violating the ordinance by keeping his saloon open on Sunday.

This question was before the court in *Sprayberry v. City of Atlanta*, 87 Ga., 120. In that case the ordinance, as in the case before us, provided that the conviction of a retailer for the violation of any of the provisions of the ordinance should work an immediate revocation of the license of such offender. *Sprayberry* obtained a license as a retailer, and was subsequently convicted of the offense of selling liquor to a minor. In upholding the ordinance, the Supreme Court of Georgia said:

"But it is claimed that he ought to have been notified by the mayor and council that his license had been revoked; that unless this was done, he must try the case himself and determine for himself whether it had been revoked or not by his conviction. What was the necessity of any notice to him? His license informed him that it was subject to be revoked. The law under which the license was granted informed him that his conviction would work an immediate revocation. What more notice could he desire? What other trial could he wish than the one he had already had in the superior court? When he was convicted there, the notice was ample that it operated as a revocation of his license. Nothing that he could have said or done before the mayor and council would have changed the record of his conviction; they would have had no discretion in the matter; the law was as imperative upon them as it was upon him."

Again, in *Martin v. State*, 23 Neb., 371, the statute provided that any license issued by the Mayor and the council should be revoked by the Mayor and the council, upon the conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of liquors. *Martin* was convicted of selling liquor on a Sunday, and the conviction having been certified to the city council, it revoked the license, under the statute, and without notice to the licensee. It was contended

there, as here, that before the mayor and council could legally revoke a license, notice should be given to the licensee in order that he might show cause, if he could, why the license should not be revoked. But, after discussing the question at length, the Supreme Court of Nebraska held that no notice was necessary, saying:

"In this case the statute makes no reference to the hearing of a complaint by the mayor and council, but simply provides that, 'the license shall be revoked, by the mayor and council, upon conviction of the licensee of any violation of any law, ordinance, or regulation, pertaining to the sale of such liquors,' etc. No trial or investigation could be had. The certificate of the police judge, showing a conviction of plaintiff in error, was before the council, they had but a simple ministerial duty to perform, in obedience to the plain mandate of the law, and that was to revoke the license. It is stipulated that he was convicted of the offense stated in the certificate of the police judge. It is admitted that the certificate was true. That being the case, no defense could have been made, and no notice was necessary to give the council jurisdiction."

A license to retail intoxicating liquors is not a contract; it vests no property rights in the licensee; and, when the law or the ordinance, under which it is issued, provides that the license shall be forfeited or revoked for any violation of the law, the licensee cannot complain that he is deprived of his property without due process of law.

See *Board v. Barrie*, 34 N. Y., 667; *Sarlo v. Pulaski County*, 76 Ark., 336, 88 S. W., 953; *Sprayberry v. Atlanta*, 87 Ga., 120; *Moore v. Indianapolis*, 120 Ind., 483.

It is plain, therefore, that the act of the Mayor of Lexington in revoking appellee's license upon the receipt of a certified copy of the judgment convicting the appellee, was a mere ministerial act, made in his administrative capacity, and was in no sense judicial. The judicial act which fixed appellee's guilt was the judgment of the police court, and no hearing, or any amount of evidence produced before the mayor, could have affected that judgment in any way. Appellee had his day in court when he was tried in the police court of Lexington; that satisfied every requirement of a valid conviction under the law of the land.

2. There is no merit in the second contention of appellee, that the saloon license of Mrs. L. C. Drake could not be revoked by reason of the conviction of her bar keeper or agent. This is true whether William Drake be regarded as the agent of his mother, or the owner of the saloon. The ordinance expressly applies to any person who conducts a saloon; it is not limited to the conviction of the owner of the saloon, and it is clear that the ordinance could not be efficiently administered if it did not apply equally to all offenders under the statute. In *Nadorff Bros. v. City of Louisville*, 144 Ky., 135, the saloon license of the owner was revoked on proof that the bar tender had sold liquor on Sunday. The question is, therefore, not an open one in this State.

Furthermore, although William Drake used his mother's name in procuring the license, he really acted for himself. His mother was a non-resident, and was not known to the city in the transaction.

For the reasons indicated, the judgment of the chancellor is reversed, with instructions to dissolve the injunction, and to dismiss the petition.

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### **Begley v. Commonwealth.**

(Decided May 23, 1913.)

#### **Appeal from Perry Circuit Court.**

1. **Homicide—Evidence—Dying Declaration.**—Where the deceased is mortally wounded and is told by the attending physician that he will not get well, and remarks that he hates to die on account of his children, his dying declaration is admissible, as it appears that it was made when the deceased had abandoned all hope of life and with a sense of impending dissolution.
2. **Homicide—Instructions.**—In a prosecution for homicide evidence examined and held sufficient to justify an instruction on the reckless handling of a pistol.
3. **Homicide—Instructions—Involuntary Manslaughter.**—In a prosecution for homicide the evidence examined and held that the failure to give an instruction on involuntary manslaughter was not prejudicial error.

**WOOTTON & MORGAN** for appellant.

**JAMES GARNETT**, Attorney General, and **OVERTON S. HOGAN**, Assistant Attorney General for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Defendant, Brown Begley, was indicted for the murder of Jesse Barger. A jury found him guilty of voluntary manslaughter and he was given an indeterminate sentence of from two to twenty-one years in the penitentiary. From the judgment of conviction he appeals.

The homicide took place under the following circumstances: Defendant, John Deaton and Jesse and Henry Barger were pitching horseshoes near a storehouse belonging to John Deaton. Defendant and Henry Barger were partners, while Deaton and Jesse Barger were partners. At the end of each game the losers would set up to cider. When defendant came to the Deaton store in the afternoon he carried a pistol in a holster around his waist. When the playing began he left the pistol in the store. According to the evidence of Henry Barger, a brother of the deceased, there was a dispute as to who won the last game. Jesse Barger claimed his shoes were the closer, the defendant claimed the contrary. Jesse Barger said "Maybe you will give me the lie over it." The defendant told him that he was a liar. Jesse Barger then said "You are a lying son of a bitch." Defendant said "I won't take it," and started down the road toward the storehouse. He went into the storehouse and came out "with his pistol and her cocked and his fingers on the trigger and hold of her this way." He had hold of the pistol with both hands. When defendant came out of the store John Deaton grabbed at him and missed him. Garrett Bowling then grabbed defendant. Witness and John Deaton then began to strike and throw each other around. John Deaton threw witness on the ground. Just after he caught John Deaton the last time the pistol fired. When witness arose defendant and Jesse Barger both had hold of the pistol. Jesse said "give me the pistol." He also said "He shot me." When Begley came out of the door Jesse Barger was from thirty-five to forty feet away. He started toward the store with two horseshoes in his hand. At the time Jesse Barger was shot he did not have either of the horseshoes in his hand. According to John Deaton, Henry Barger himself told defendant to get his pistol, saying "we won't take this." The deceased, Jesse Barger, said, "If you want to fight, you can fight us a fair fight; we haven't got any pistol; you needn't go and get your pistol." Defendant went into the

storehouse and came out with his pistol in his hand. When he came out the witness went to him and throwing his right arm around him, took hold of his pistol with his left hand. When witness took hold of the pistol defendant held the pistol with both hands. Garrett Bowling also caught hold of defendant from behind. Defendant said "Boys, be careful, you are scuffling over this pistol and she is liable to go off and hit somebody." When the pistol went off, Jesse Barger, the deceased, was very close to defendant. As well as witness could remember defendant had hold of the handle of the pistol with his right hand and his left hand was hold of the cylinder. When the pistol went off witness had his left hand on the barrel and his hand was powder burned. When witness took hold of defendant, defendant remarked that he didn't want any trouble. Garrett Bowling testified that when the discussion arose over whether or not Jesse Barger had moved the shoe, defendant told him "every time he said he didn't put it there, he was a God damned liar." Jesse said "Every time he said he slipped the shoe up there, he was a God damned son of a bitch." Defendant then turned and started to the storehouse, at the same time saying he would not take that. Defendant went into the storehouse and came out with a pistol in both hands. Witness took back holds on him and told him he must give up that pistol. He did not remember of defendant saying anything. He thinks the pistol was cocked, but never saw him cock it. About that time John Deaton took hold of the pistol. When John Deaton caught the pistol, defendant "had her in his right hand, grabbed hold of the breech of her and his thumb on the lock of her and her cocked." John Deaton took hold of the barrel. While witness and John Deaton were holding defendant, defendant wasn't trying to do anything. When Jesse Barger approached he raised the mule shoe over defendant's head and told him "if he fooled with him, he would split his God damned brains out." Henry Barger then struck John Deaton knocking him back loose from the pistol. John recovered and hit Henry in the face, knocking him nearly down. Deaton then caught the pistol in his left hand and jerked Brown around to the right. Henry then struck Deaton again in the same way. Deaton struck Henry; Henry recovered and came at him the third time. Deaton then clutched the muzzle of the pistol in his left hand and the pistol went down out of my sight and him



hold of the muzzle of her with his left hand and before she come back in my sight (I was in behind Brown), she fired." At the time the pistol was fired Jesse Barger was reaching after it with both hands. Dr. Gross testified that the ball from the pistol entered the left side of deceased; deceased died from the effects of it the next day. After examining the wounds the doctor told deceased that he thought he was going to die. Deceased replied that all he hated to die for was his children. He gave deceased a hypodermic of morphine to relieve his suffering, and later on gave him another. On cross examination the doctor said that he told deceased that he didn't think he could live. The effect of the morphine was to brighten the mind of deceased. Deceased then made a statement as to how the difficulty occurred. The material part of the statement is that "he (Brown Begley) creened the pistol and he shot." Afterwards, the dying declaration was excluded and the jury told not to consider it.

The defendant testified to the fact that they were all engaged in pitching horseshoes. His side won and they started to set up to cider. Jesse said "they had beat us." Witness then went into the storehouse, thinking that they were all coming in. He got his coat and hat and pistol and walked out. John Deaton and Garrett Bowling both seized him and began to scuffle around with him. They had him bent over. At that time Henry Barger was cursing and saying that "he wasn't going to set up the cider." He never even saw Jesse Barger when the pistol went off. He never shot the pistol. He never attempted to raise the pistol or to shoot it. He had brought his pistol there and left it in the storehouse and went there to get it for the purpose of taking it home. Before he went into the storehouse, he and Jesse had some words. They gave each other the lie and something else. The pistol he had was a forty-five, and he carried it in a hip holster. When the pistol went off he felt no rebound from it; couldn't even say that the pistol was in his hand. Lizzie Deaton says that the defendant and deceased had a dispute about the game. Defendant then started toward the store. When he got about half way he said "All of you come on" and laughed. She never saw defendant go into the store. The next time she saw him both John Deaton and Garrett Bowling had hold of him. Henry Barger struck John Deaton, and about that time the pistol went off.

It is insisted for the defendant that notwithstanding the fact that the court subsequently withdrew from the consideration of the jury the dying declaration of Jesse Barger, yet in view of the fact that the statement had been admitted it was impossible to remove the effect which it produced by merely telling the jury not to consider it. Why the court subsequently withdrew the dying declaration does not satisfactorily appear. The evidence of the attending physician to whom the declaration was made is to the effect that he advised the deceased that he could not get well. The deceased answered in effect that all he hated to die for was his children. At the time, the deceased was mortally wounded, and the declaration was made during the night preceding his death. He died the next morning. The statement was not made at a time when his mind was clouded or rendered unconscious by morphine. As a matter of fact, the declaration was made when deceased knew that he was going to die and had abandoned all hope of life, and with a sense of impending dissolution. *Commonwealth v. Hargis*, 124 Ky., 356; *Kennedy v. Commonwealth*, 100 S. W., 242, 30 K. L. R., 1063; *Kelly v. Commonwealth*, 119 S. W., 809. We, therefore, conclude that the statement in question was competent as a dying declaration.

The court instructed the jury on murder, voluntary manslaughter, accidental shooting, and reckless handling of fire arms. Defendant claims that the court erred in giving an instruction on the reckless handling of fire arms, and in failing to give an instruction on involuntary manslaughter. The evidence in the case leaves no doubt that defendant was called a vile epithet by the deceased. There is a conflict in the evidence as to whether defendant said he wouldn't stand for that, or whether Henry Barger remarked that they wouldn't stand for it and told him to go get his pistol. At any rate, defendant immediately went for his pistol, which was in the storehouse. He came out with his pistol, according to some of the witnesses, in both hands, and according to others, in his right hand. The pistol was not in his holster. The evidence leaves no doubt that the pistol was cocked for it was of the kind that would not go off unless cocked. Though claiming that he did not fire the pistol and that he did not intend to shoot the deceased, but that the shot was the result of an accident occasioned by the fact that he was being held by others, the fact nevertheless re-

mains that the pistol was discharged and the ball struck and killed Jesse Barger, a man who had just previously insulted him and whose remarks were the cause of his going after the pistol. There was evidence from which the jury could infer that defendant either shot the man that he intended to shoot, or that he carelessly and negligently turned the pistol in his direction and fired. We conclude, therefore, that the court did not err in instructing the jury on the reckless handling of the pistol. Without passing on the question of whether or not an instruction on involuntary manslaughter should have been given, we conclude that the failure to give such an instruction was not prejudicial error under the facts of this case. Those who seized defendant were evidently trying to prevent him from shooting the deceased. Notwithstanding their efforts in this direction he succeeded in his purpose. Accidental and unintentional killings do not happen in this way. The evidence would have justified a much heavier penalty.

Judgment affirmed.

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### **Eutsler v. Commonwealth.**

### **Eutsler v. Commonwealth.**

### **Eutsler v. Commonwealth.**

(Decided May 23, 1913.)

### **Appeals from Harlan Circuit Court.**

1. **Appeal—Jurisdiction—Prosecution for Misdemeanors.**—Section 347, Criminal Code, fixes the appellate jurisdiction of the Court of Appeals, in penal actions and prosecutions for misdemeanors; and, by its provisions, an appeal by a defendant from a judgment of the circuit court in a penal action or misdemeanor, cannot be entertained by the Court of Appeals, unless the "judgment be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days."
2. **Appeal—Jurisdiction of Court of Appeals in Prosecutions for Misdemeanors—Satisfaction of Judgment.**—Where in such case the fine in the circuit court exceeds fifty dollars and the imprisonment is less than thirty days, and the defendant, after superseding the judgment, pays the fine and thereby satisfies the judgment pending the appeal, such satisfaction of the judgment deprives the Court of Appeals of jurisdiction of the appeal and compels its dismissal.

W. F. HALL, F. F. ACREE and ZEB. A. STEWART for appellant.

JAMES GARNETT, Attorney General, O. S. HOGAN, Assistant Attorney General for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Dismissing Appeals.

The appellant, George W. Eutsler, was tried and convicted in the Harlan Circuit Court under each of three indictments, charging him with the offense of selling spirituous liquors, in territory where local option was in force. In one of the cases the punishment inflicted by the verdict of the jury and judgment of the court was a fine of \$100 and ten days imprisonment; in each of the two other cases a fine of \$80 and twenty days imprisonment.

Appellant filed in each case a motion and grounds for a new trial, but, the motions being overruled, he prayed and was granted, in each case, an appeal to this court; following which the several judgments were superseded by the execution on his part of the required appeal bonds. Counsel for the Commonwealth have entered a motion to dismiss each of the appeals on the ground that as the judgments, save \$14 of the third one, have been paid by the appellant since the appeals were taken, this court is without jurisdiction to entertain or decide them.

Section 347, Criminal Code, provides:

“The Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for misdemeanors, in the following cases only, viz.: If the judgment be for a fine exceeding fifty dollars, or for imprisonment exceeding thirty days; or, if the judgment be for the defendant, in cases in which a fine exceeding fifty dollars, or confinement exceeding thirty days, might have been inflicted.”

We have frequently held in civil actions that a defendant against whom a recovery for money is had, does not, by replevying or paying the judgment, waive his right to prosecute an appeal. *Keller v. Williams*, 10 Bush, 216; *N. C. & St. L. Ry. Co. v. Bean*, 128 Ky., 758; *Pike, Morgan & Co. v. Wathen*, 25 R., 1264; *Shannon v. Padgett*, 24 R., 1281. The reason for so holding is thus well stated in *Kellar v. Williams*, *supra*:

“While the case was pending no act of the debtor incidental to such a proceeding to enable him to prevent

his property from being sold to satisfy what he sold to satisfy what he supposed to be an erroneous judgment can be deemed to be a waiver of his right to an appeal. He might have satisfied the judgment by an actual payment of the money; and if reversed, the creditor by rule could have been required to refund it."

The same conclusion is more elaborately expressed in the opinion in *N. C. & St. L. Ry. Co. v. Bean*, *supra*, as follows:

"A defendant in a judgment may prosecute an appeal from it, although he may have paid it. The appeal does not affect the judgment until it is reversed. Hence if the appellant was unable to give the supersedeas bond required by the code in order to obtain a stay of the execution pending the appeal, he would be under the necessity of suffering his property to be seized and sold by the sheriff, "with added costs and possible sacrifices. Yet in that event his right of appeal would not be affected, as otherwise the right of appeal would be valuable only to the rich, who could make the supersedeas bond, and to the very poor, who were execution proof. What one may be compelled to do, he may do without compulsion, without impairing his legal rights. So it is held, if he pays off the judgment, he may nevertheless prosecute an appeal from it, and, if it is reversed, may have restitution of what he has paid, with interest."

In neither of these cases was the judgment superseded, hence the act of the defendant in replevying the judgment was not inconsistent with the right to prosecute the appeal. But if he had stayed proceedings on the judgment by the execution of a supersedeas bond, the subsequent voluntary replevying of the judgment, or its payment, by him, would, we apprehend, have constituted a satisfaction thereof and deprived him of the right to further prosecute the appeal; and, if the record had been filed in the appellate court, furnished grounds for the dismissal of the appeal. *Am. & Eng. Enc. Law & Practice*, 287-279; *Trumble v. Jefferson Co.*, 37 Wash., 604.

If it were necessary to concede that the cases before us should be tested by the rule applying to appeals in civil cases, as appellant upon taking the appeals from the judgments against him, executed in each case a proper bond and thereby superseded each judgment, we must conclude that the payment made by or for him on the judgments appealed from, were intended to and did

satisfy them, except as to the balance of \$14, yet due on the third judgment. It is not claimed or pretended by appellant that the payment was made to prevent his property from being levied upon and sold in satisfaction of the judgments, or to prevent his confinement in jail under *capiases* either in payment of the fines, or to serve out the terms of imprisonment imposed as punishment by the judgments, for, pending the appeals, his property was protected from sale and his person from imprisonment by the supersedeas bonds he had executed.

Aside from these considerations, appellant cannot, in the event of a reversal of the judgments appealed from, recover of the Commonwealth what he has paid on the judgments; nor could he in the event of reversals do so had they not been superseded. The State cannot be sued by one of its citizens without an enabling act from the Legislature. So, it cannot be claimed that the appellant paid the judgments with the expectation that the money would be refunded if the judgments are reversed. By his payment to the clerk of the Harlan Circuit Court of the amount shown by his response to the motion to dismiss the appeals, appellant deprived himself of a hearing on his appeals, as he thereby entirely satisfied two of the judgments appealed from and left unpaid of the third judgment only \$14, which reduced it to an amount of which this court has no jurisdiction. In other words, we cannot entertain the appeals, for two of the judgments have been satisfied and appellant's only liability on the third one is for an amount or fine less than \$50; therefore section 347, Criminal Code, deprives us of jurisdiction. The imprisonment imposed by the judgments does not give us jurisdiction, for in each case it is less than the thirty days required by the section of the code, *supra*, to confer such jurisdiction.

If, as intimated in the clerk's certificate filed with appellant's response, the money received by that officer in satisfaction of the judgments was paid by the appellant's wife, it cannot affect the question of jurisdiction. She does not appear in the transaction as a volunteer, and the certificate of the clerk merely says he "is informed" the money was paid by her. Whether such information was given by her, or reached the clerk through rumor is not stated; and as the appellant's response does not disclaim responsibility for the payment or claim that the money was not furnished by him, it is

but fair to presume that it was his money, and, if delivered by the wife, that she was acting for him and at his request. Especially, is such presumption admissible, as it appears he was absent from Harlan county, when the money was paid.

The motion of the Commonwealth is sustained and each of the appeals hereby dismissed.

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## Chesapeake & Ohio Railway Company v. Laney.

(Decided May 23, 1913.)

### Appeal from Lawrence Circuit Court.

1. Master and Servant—Personal Injury—Proximate Cause—Evidence—Peremptory.—Where a servant was injured by a hand car moved by another servant of the master, pursuant to an order of the foreman, the evidence examined and held that the question of whether or not the giving of the order was the proximate cause of plaintiff's injury was for the jury.
2. Master and Servant—Negligence of Superior—When Master Liable.—A servant cannot recover of the master for the negligence of a superior in the same department, unless the negligence be gross.

M. C. KIRK, F. T. D. WALLACE and WORTHINGTON, COCHRAN & BROWNING for appellant.

C. F. SEE, JR., and W. D. O'NEAL, JR. for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

In this action for damages for personal injuries, brought by plaintiff, Bob Laney, against the Chesapeake & Ohio Railway Company, plaintiff obtained a verdict and judgment for \$200. The railway company appeals.

There is not much contrariety in the evidence. It appears that on August 8, 1911, A. J. Rittenberry was the foreman in charge of a section crew consisting of plaintiff and two other laborers. They were returning from their work on one of the company's hand cars. When they reached Gallop Station, in Lawrence County, Kentucky, they were overtaken by a rainstorm and repaired to a nearby store for shelter. The hand car was left on the track. In a few minutes a freight train was heard approaching, and the four men ran to the hand

car for the purpose of removing it from the track. To assist in this work plaintiff took a position in front of the car and caught hold of the handle of the car. The other two section men, Mac Preese and Joe Chapman, took positions at the rear end of the car and next to the approaching train. Just as plaintiff took hold of the car, Rittenberry, the foreman, came up and directed the men to shove the car down to a crossing a few feet distant. When first seen the train was about a quarter of a mile distant and was rapidly approaching. At the time the order was given the foreman was on the car. Upon the giving of the order, Preese pushed the car forward, and at the same time looked backward over his shoulder at the approaching train. Plaintiff was pushed down on the ties and a projecting bolt on the car struck and injured his leg. The foreman put his foot on the brake and brought this car to an immediate stop. The evidence further shows that plaintiff's position in front of the car was the proper one in order to assist in moving the car from the track. Plaintiff had no opportunity to get off of the track before the car was pushed.

It is first insisted that the trial court erred in refusing to direct a verdict in favor of the defendant on the ground that the negligence of Preese, a fellow servant, was the proximate cause of plaintiff's injury. In this connection it is insisted that the foreman did not contemplate that his order to shove the car to the crossing would be obeyed before giving plaintiff an opportunity to get from in front of the car, and that Preese alone was negligent because he pushed the car while plaintiff was in front of it. The record, however, makes it clear that the whole affair took place in a very brief space of time. The freight train was not far away and was rapidly approaching. The section men were going to move the car from the track at the point where it stood. Had they done so, plaintiff would not have been injured. Had there been plenty of time to shove the car to the crossing a different question would be presented. As it was, an emergency existed. Immediate action was necessary. The order of the foreman necessarily contemplated immediate action. The foreman knew that plaintiff was in front of the car. Without giving plaintiff an opportunity to get out of danger, he gave the order. To escape the approaching train the order had to be quickly obeyed. Under these circumstances we cannot say, as a matter of law, that the giv-



ing of the order was not the proximate cause of plaintiff's injury. The trial court, therefore, did not err in refusing the peremptory instruction asked for by defendant.

It appears, however, that the court's instruction authorized a recovery for ordinary negligence on the part of the foreman. The foreman and the plaintiff were in the same department of labor, but occupied the positions of superior and inferior. We have repeatedly held that in an action, not resulting in death, a servant cannot recover for the negligence of a superior, unless the negligence be gross. *Louisville & Nashville Railroad Co. v. Foard*, 104 Ky., 456; *Chesapeake & Ohio Railway Company v. Marcum*, 136 Ky., 245. It follows that the instruction complained of is erroneous.

For the reasons given the judgment is reversed and cause remanded for a new trial consistent with this opinion.

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## **Commonwealth, By, et al. v. Southern Pacific Co., et al.**

(Decided May 23, 1913.)

### **Appeal from Jefferson Circuit Court (Chancery Branch, First Division).**

1. **Taxation—Assessment of Omitted Property—Proceeding by Revenue Agent to Collect School Taxes—Motion for Rule Against Sheriff to Show Cause Why He Had Not Collected School Taxes—Refusal of Rule.—**Following proceedings involving litigation in the Jefferson County Court, the Jefferson Circuit Court, the Court of Appeals, and the Supreme Court of the United States, a judgment was finally entered in December, 1911, wherein certain property of appellee was assessed for taxation for the years 1907 and 1908, and in March, 1912, an order was entered reciting satisfaction in full of the judgment. There was no mention in the pleadings indicating a purpose to collect school taxes.
2. In February of this year the revenue agents who had originally instituted the action, filed affidavits that appellee company was a resident of school district 46 of Jefferson County, and asked a rule against the sheriff of the county to show cause why he had not collected school taxes on the omitted property of the company. Upon notice to the company and the sheriff of the motion, the company did not respond, but the sheriff filed a response admitting the domicile of the company to be in the school district, that it was liable for the taxes, and joined with plaintiffs in asking a modification of the judgment so as to authorize him to dis-

train for the taxes. Upon appeal from the judgment overruling the motion, Held, That the revenue agents had no such interest in the collection of the school taxes as authorized them to enter these motions, it did not appear that the company was a resident of any particular school district; that it had had its day in court on the question of its residence in the district, or whether its property was liable to assessment therein for school purposes.

3. **Taxation—School Taxes—Section 4260 Ky. Stats., does not Embrace School Taxes.**—The "State taxes" referred to in section 4260 Kentucky Statutes, are only such as go into the State Treasury when collected, and it is not intended to embrace school taxes which never reach the State Treasury.
4. **Taxation—School Taxes—Duty of School Authorities to Collect—When Any Taxpayer May Proceed to Have School Taxes Collected.**—If the school taxes are due for the years named, it is the duty of the school authorities of the district to take such steps as may be necessary to require the proper officer to collect them; and if the school authorities have failed, or refused to do so, it is within the power of any taxpayer of the district to resort to that remedy.

MATT J. HOLT for appellants.

HUMPHREY, MIDDLETON & HUMPHREY for appellees.

OPINION OF THE COURT BY JUDGE TURNER—Affirming.

The Southern Pacific Company is a corporation organized under the laws of this State and having its principal place of business at Beechmont in Jefferson County, Kentucky. It does an extensive railway business, and operates in connection with its railway properties certain steamship lines.

This proceeding originally was instituted in the Jefferson County Court seeking to have assessed in that court certain omitted property of the Southern Pacific Company; after extended litigation in the county court, the Jefferson Circuit Court, this court, and the Supreme Court of the United States, a judgment was finally entered in December, 1911, wherein certain steamships and other property of the company were assessed for the years 1907, and 1908.

Thereafter, in March, 1912, an order was entered reciting satisfaction in full of the judgment.

Throughout the litigation no mention was made in the pleadings that the Southern Pacific Company was a resident of any particular school district, or graded school district, and no suggestion was made indicating a purpose as a result of the suit to collect any such taxes.

In February of this year the Revenue Agents who had originally instituted the action, through their attorney appeared in the Jefferson Circuit Court, filed affidavits stating that the Southern Pacific Company was a resident of Common School District No. 46, of Jefferson County, and asked that such orders and decrees be entered as might be necessary to procure the collection of the school taxes, including a modification of the original decree if deemed necessary; and asked for the issual of a rule against the sheriff of that county to show cause why he had not collected the school taxes on this omitted property.

Notice of this motion was given both to the sheriff and the Southern Pacific Company. The company did not respond, but the sheriff filed a response wherein he admitted that the domicile of the company was in school district No. 46, and that the company was liable for taxes, and they were unpaid. He joins with the plaintiffs in asking a modification of the judgment so as to authorize him thereunder to distrain for the school taxes.

The lower court overruled the motion for a rule, and declined to modify the judgment, and the Commonwealth has appealed.

The judgment must be affirmed on two grounds:

(1) The Revenue Agents had no such interest in the collection of the school taxes as authorized them to enter these motions. Section 4260 of the Kentucky Statutes in so far as it fixes the compensation of revenue agents and penalties which may be assessed against owners of omitted property, provides:

"All persons owning property which may be assessed as herein provided, shall, in addition to the taxes, pay the costs of the proceedings and a penalty of twenty per centum on the amount of the State and county taxes due, except where such property shall have been duly listed by the owner thereof. The taxes, costs and penalties shall be collected and accounted for as other taxes and penalties are required to be collected, and by the same officers. As compensation for his services in causing such property to be assessed, the officer filing the statement shall be entitled to the penalty of twenty per centum, and the same shall be paid to him by the county tax collector collecting said county taxes and penalty thereon within thirty days after receiving same, and by the officer of the State collecting or receiving State taxes within thirty days after receiving same."

It seems to have been assumed by the revenue agents that upon the collection of the school taxes, it would have been proper to assess a penalty of twenty per centum on their amount, and they would have been entitled under the statute to that penalty as their fee. This view has doubtless grown out of the fact that this court in several cases has in a broader sense referred to school taxes as State taxes in distinguishing them from municipal taxes.

*City of Louisville v. Commonwealth*, 134 Ky., 488.

*Prowse, &c. v. Board of Education of Christian County*, 134 Ky., 365; *City of Louisville v. Board*, 17 Ky. L. R., 697; *Bamberger v. City of Louisville*, 82 Ky., 337; *Henderson v. Lambert*, 8 Bush, 607; *City of Louisville v. Board*, 119 Ky., 574; *Crabbe v. Trustees*, 132 Ky., 478.

School taxes are either levied directly by the State or by municipalities under express grant of power from the State, and in that more comprehensive sense, they are referred to as "State taxes." But the term "State and county taxes" as used in section 4260 must be given a more restricted meaning in so far as it prescribes the penalty and fixes the compensation of revenue agents.

The "State taxes" referred to in that section are only such as go into the State Treasury when collected, and it is not intended there to embrace school taxes which never reach the State Treasury. This interpretation of the statute is in harmony with the provision of section 184 of our constitution wherein it is declared that taxes produced for school purposes shall be appropriated to no other purpose. Indeed it seems that this same interpretation was put upon the statute by the revenue agents themselves in this very case, for after accepting the penalties collected on the assessment for State and county taxes, they recited in an order of court full satisfaction of the judgment, and waited for about a year before they renewed this proceeding. Having no such interest in the school taxes as would justify them in renewing this proceeding, the court properly overruled their motion.

(2) In proceedings of this character the court acts purely in a ministerial capacity, merely assessing the property which the assessor has failed to assess, and fixing the value thereof for taxation; it renders no judgment for money and directs the collection of no taxes. After the assessment is made by the court and the value fixed, it is the duty of the collector to collect the taxes just as if the assessment had been made by the assessor in the first place. It would be clearly illogical for the

court under such conditions to require an officer, by rule, to collect a given amount of money when it had rendered no such judgment. And particularly so in this case where as a matter of fact it did not appear that the Southern Pacific Company was the resident of any particular common school or graded school district; and where it did not appear that the company had ever had its day in court on the question whether it was a resident of any such district, or its property therein liable to assessment for school purposes.

It is true the assessment for one purpose was sufficient for all purposes; but the remedy was to require the ministerial officer whose duty it was to collect the taxes to perform that duty. If the school taxes are due for the years named, it is the plain duty of the school authorities of that district to take such steps as may be necessary to require the proper officer to collect them; and if the school authorities have failed or refused to do so, it is then within the power of any tax payer of the district to resort to that remedy.

Judgment affirmed.

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## Corley's Admx. v. Green-Marks Concrete Company.

(Decided May 23, 1913.)

### Appeal from Muhlenberg Circuit Court.

**Master and Servant—Blasting—Injury to Servant—When Master Not Liable—Ordinary Care.**—When due notice is given of an intended blast, and the servant understanding the danger, undertakes to protect himself, the master is not responsible if the servant is injured by reason of his own want of precaution, it not appearing that the master saw his danger and could have averted it by ordinary care.

ROBERT HARDISON and HOWARD & GRAY for appellant.

NEWTON BELCHER and BELCHER & SPARKS for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

The Green-Marks Concrete Company was making an excavation for a new jail to be erected at Greenville; J. C. Corley was working for them and using a pick and

shovel until they struck rock. After they struck rock they began blasting the rock; a wagon was used to haul out the material that was gotten up, it being Corley's duty to clean up and help load the wagon. When blasts were fired the boss would give notice to the men in time for them to get out of the excavation, and get to a place of safety. There were several public ways near by, and it was the duty of certain of the men to go out on these ways and stop people from passing. It was Corley's duty and a man named Bandy, to give this notice at a certain point. There was a stable there; the boss had several times told them to go into this stable, but they had not always done so. After they had been blasting several days in this way, when a blast was made, Corley and Bandy started down in the direction of the stable but stopped after going about 90 feet and waited there four or five minutes for the blast. When the blast was fired, a rock about as large as a man's fist was thrown in the air. Bandy saw the rock and avoided it, but Corley, who did not see it, was struck on the head and killed. This action was brought by his administratrix to recover for his death. The court at the conclusion of the evidence for the plaintiff instructed the jury to find for the defendant, and the plaintiff's petition having been dismissed, she appeals.

The proof on the trial showed the facts we have stated. It also showed that the boss after he gave notice that the blast was to be fired, and when the men were about to light the fuse, saw that the wagon had not gotten out of the way. He then hallooed to the man at the fuse and told him not to light it. They waited until the wagon was out of the way. Corley and Bandy were walking behind the wagon, and when the wagon got out of the way, went on down toward the place where they usually went. After they had gotten away, the boss had the man at the fuse to light another match and apply it to the fuse. The man did this and after lighting the fuse, went to his place of safety, and in about four or five minutes, the blast exploded. The boss after the fuse was lighted went to a point about 50 feet from the blast at which he was protected by the bank, and while standing there, if he had looked, could have seen Corley and Bandy, who were standing about 90 feet from the blast but at a point where the bank did not protect them. That he in fact saw them is not shown. If they had gone down to the stable as they had usually done and gone in the stable they would have

been in no danger; or even if they had gone a few feet further; for Bandy testifies that he got out of the way by moving about fifteen feet further off. When they began blasting the boss asked Corley if he knew how to use powder. He said no he was not a dynamiter, but he knew how to get out of the way. The blast that was put in was a small blast and the accident was entirely due to Corley and Bandy standing at a point where the bank of the excavation did not protect them, and where there was no other protection.

It is insisted that the case should have gone to the jury because the boss did not explain to Corley the danger from the blast. But he had told the boss that he knew how to get out of the way; they had been blasting several days. They all knew they were liable to be hit if they did not get out of the way, and the boss had on more than one occasion told them to go in the stable. They all understood the danger.

It is also insisted that the case should have gone to the jury on the ground that the boss knew they were in a place of danger and did not take steps to avert the danger to them. But while the boss might have seen them if he had looked, the evidence fails to show that he in fact did know that they had stopped at the point where they were. He had a right to assume that they would obey his instructions, because it was a part of their duty to warn travelers on the way. After the fuse was lighted, the boss had himself to go to a place of safety, and it is by no means clear that if he had looked after he got to a place of safety, that he could then have averted the danger in which Corley and Bandy had placed themselves. We therefore conclude that the circuit court properly instructed the jury peremptorily to find for the defendants.

Judgment affirmed.

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**Jones & Company v. The Ferro Concrete Construction Company, et al.**

(Decided May 27, 1913.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Third Division).

1. Negligence—Damages—Injury to One Contractor by Negligence of Another.—The Louisville Commissioners of Sewerage are not

- answerable in damages for an injury done to one contractor by the negligence of another contractor for the building of a sewer.
2. Negligence—Damages—Injury to Contractor Engaged in Public Work—Liability.—One contractor who injures another contractor by his negligence is liable therefor, in the case of a public work just as he would be in the case of a private work.

SHIELD & CAMPBELL and CAMDEN R. McATEE for appellants.

E. P. HUMPHREY, JOHN MARSHALL and WM. W. CRAWFORD for appellees.

Opinion of the Court by Chief Justice Hobson—Affirming as to the Sewerage Commission and Reversing as to the Ferro Concrete Construction Company.

The Commissioners of Sewerage of Louisville, acting under the statute, made plans for the construction of a system of sewers, divided the sewers into sections, and took bids for the construction of the different sections. One of the largest sewers was the Southern Outfall, extending westwardly through the southern part of the city and emptying into the Ohio River west of the city. Section A of this sewer extended from the river to the east bank of Paddy's Run; section B extended from the east bank of Paddy's Run to Thirty-Second street and Woodland avenue. Section A was let to the Ferro Concrete Construction Company; section B to T. B. Jones & Company. Paddy's Run is one of the old natural sewers of the city which carries off the water from a large water shed. The line of the proposed Southern Outfall sewer crossed Paddy's Run. At this point Paddy's Run is over one hundred feet wide and twenty-five feet deep from the top of the bank to the bottom. At ordinary times, the water in Paddy's Run is only a foot or two deep, but in case of a heavy rainfall, a great quantity of water is collected in it.

T. B. Jones & Company began to work on Section B before work was begun on Section A. They sunk a wooden sheathing of heavy planks about five feet east of the beginning point of Section B, and then began excavating eastwardly. They built in the western end of the sewer a brick bulkhead with Portland cement, which was attached to the side wall. This bulkhead was a few feet east of the wooden sheathing, the entire space between being filled with dirt. The bulkhead was braced inside the sewer with heavy timbers, its purpose being to keep the water of Paddy's Run from getting into the sewer in



time of freshet. The sewer contained a great deal of machinery and other property of the contractors, and at its completion was to be inspected before acceptance and therefore it was necessary to have it in clean and in good condition every way. When the Jones Company had completed their sewer for a distance of about 1,600 feet east of the beginning point on Paddy's Run and were extending their excavation further to the east, the Ferro Concrete Construction Company was likewise coming eastward with its work on Section A, beginning at the river. In February, 1909, it undertook to cross Paddy's Run, the plans here requiring that the sewer should lie wholly or almost wholly below the bed of the creek. To this end the Ferro Concrete Construction Company began excavating across the bed of the creek, the dirt taken out being dropped in the creek bed below the excavation and by the side of it. Excavations were also made in both banks, and this dirt was also piled in the creek bed. In excavating on the east bank, they went across the Jones line and removed the sheathing, and all the dirt in front of the Jones brick bulkhead. The dam in the creek formed from the dirt they took out, became thirty or thirty-five feet high above the excavation bottom. To carry off the waters of Paddy's Run two twelve-inch tiles were laid down when the excavation was begun, but the earth spread out so at the bottom that these pipes were more or less obstructed. In this condition of things, there were heavy rains in February from which a large quantity of water accumulated against the dam and rose within five feet of its top, submerging the bulkhead entirely, the drain tiles in the dam being clogged. The danger to Jones & Company in this condition of things became apparent, and the matter was taken up between the two contractors and the Sewerage Commission, but before anything was done, and when, according to the proof, the trouble might have been remedied before any damage had been done, on the morning of February 24, the bulkhead could stand the strain no longer, and gave way. The flood stood twenty-six feet deep in the Jones sewer at the eastern end. Four days were consumed in pumping the water out, and the machinery had to be repaired; the debris had to be removed and considerable damage was done to the Jones equipment. Jones & Company brought this suit against the Commissioners of Sewerage and the Ferro Concrete Construction Company to recover the damage which they thus

sustained, and at the conclusion of the evidence which showed the facts we have stated, the circuit court peremptorily instructed the jury to find for the defendants. The plaintiffs' petition having been dismissed, they appeal.

The circuit court in an opinion which is filed in the record stated in substance that the sewer commission is not responsible because they were acting in a governmental capacity in a work undertaken for the benefit of the health of the city (*Smith v. Com. of Sewerage*, 146 Ky., 562); and that if the governmental authority itself is not responsible, the agent employed by it is not responsible. (*Bluegrass Traction Co. v. Grover*, 135 Ky., 685). Concluding its opinion the court said:

"The matters complained of here, as it seems to the court, tend to establish negligence on the part of the Ferro Concrete Construction Company; yet under the authorities I have just referred to, and under the construction of the law as made by the Court of Appeals, it is my duty to instruct you peremptorily that there is no cause of action in favor of the plaintiffs. I do it with considerable regret in this case. Personally, I think it is a case that ought to go to the jury, but I am bound to follow the decision of the Court of Appeals, and it is my duty to so instruct you."

Counsel assail both these conclusions of the court, and, as they depend upon different principles, they will be considered separately.

1. *As to the liability of the Sewerage Commission.* We have held in a long line of cases that the city is not liable for the negligence of its servants in the discharge of its governmental functions. (*Twyman v. Frankfort*, 117 Ky., 518; *Kippes v. Louisville*, 140 Ky., 423; *City of Bowling Green v. Rogers*, 142 Ky., 559; *Allison v. Cash*, 143 Ky., 679; *Smith v. Commissioners of Sewerage*, 146 Ky., 562, and cases cited.) We deem it unnecessary to re-state the reasons impelling this conclusion as they are fully set out in the opinions referred to. In the case last cited it was pointed out, that this rule applies to causes of action for the death of a person under section 241 Ky. Stats., no less than in other cases. It is insisted, however, that the rule cannot be applied here by reason of section 242 of the Constitution which is as follows:

"Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for prop-

erty taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured at the election of such corporation or individual, before such injury or destruction."

It is insisted that this case involves the taking or injury of private property, and that under the Constitutional provision compensation must be made. But it will be observed that the constitutional provision is that municipal or other corporations invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them. In other words, the provision has reference to property taken under the power of eminent domain; it has no reference to property which was not taken and could not be taken under the power of eminent domain. It is not the purpose of the constitutional provision to make municipal corporations liable for all injuries to property inflicted by the negligence of their servants, irrespective of the fact that the corporation was in this work acting as an arm of the State government, and discharging a governmental function. The case we think comes in substance to this: The Sewerage Commission was having a large sewer built and let one section of the sewer to one company, and another section to another. By the negligence of one of the contractors, an injury was done to the other. We deem it unnecessary to determine whether the contractors were independent contractors or the servants of the sewerage commission. If they were independent contractors, the Sewerage Commission was not responsible for their acts; if they were not independent contractors, but servants of the Sewerage Commission, then the Sewerage Commission is not responsible to one of its servants for the negligence of another servant. To so rule would be to make the Sewerage Commission answerable in all cases for damages done to another by the negligence of its servants; and this, as we have repeatedly held, is not the law. To so rule would deflect from their express purposes public taxes levied by law pursuant to the Constitution for governmental purposes and might defeat entirely the purpose of the levy as well as the purpose of section 180 of the Constitution which provides:

"Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for

which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

The money in the hands of the Sewerage Commission is a fund created to supply the city with an adequate system of sewers and under the mandate of the Constitution, may not be devoted to other purposes. Were the rule otherwise the usefulness of the various arms of the State government might be seriously crippled.

We, therefore, conclude that the circuit court properly instructed the jury peremptorily to find for the Sewerage Commission.

2. *As to the liability of the Ferro Concrete Construction Company.* The circuit court seems to have misapprehended the decision in *Bluegrass Traction Company v. Grover*, 135 Ky., 685. In that case the Bluegrass Traction Company was building its line from Georgetown to Lexington. Its line crossed the turnpike leading from Georgetown to Lexington, and also crossed the Cincinnati Southern Railroad near the same point as the turnpike crossed it. There was then a grade crossing of the turnpike over the railroad. It was agreed between the railroad company, the traction company and the fiscal court of Fayette county, that the traction company at its expense would change the location of the turnpike, and build an overhead bridge across the railroad. It being agreed that the county would keep up the turnpike after it was rebuilt on either side of the bridge and that the traction company would maintain the bridge "free of cost to Fayette county." The work was done as agreed. Some years afterward Grover's horse got his foot through a hole in the bridge, and his leg was broken. He sued the traction company for the value of his horse, his action being based upon the contract between the traction company and the county. The question was whether it was within the reasonable contemplation of the parties to the contract that the traction company assumed liability for such an accident, its undertaking being only to maintain the bridge "free of cost to Fayette County." After pointing out the peculiar language, and what the parties had in mind in making the contract, the court said:

"In other words, it is clear from the contract that what the parties had in mind was that Fayette County should be free forever from the burden of maintaining the bridge. It is simply a contract by which the traction

company assumes to do for Fayette County what it would otherwise be required to do; and by this contract it assumes no greater liability than Fayette County was under."

That was a suit upon the contract and the question decided was simply that the damages sued for were not within the reasonable contemplation of the parties to the contract, and not covered by its terms. If this was a suit upon the contract made by the Ferro Concrete Construction Company with the Sewerage Commission, and damages were claimed by reason of a breach of the terms of that contract, then the two cases would be similar. But this is not a suit for a breach of a contract. It is a suit to recover damages for negligence. If in that case the traction company had negligently thrown a timber from its bridge and injured Grover's horse beneath, then the two cases would be parallel. No such question was presented by that record, and the opinion of the court is limited to the effect of the contract. The court did not have before it in that case the question of the liability of the traction company for negligence independently of its contract with the fiscal court.

Two contractors for a public work stand as to each other just as two contractors would stand who had undertaken any other work. It is the duty of each to so use his own as not to injure the other, and to exercise such care for the protection of the other as a man of ordinary prudence would use for his own protection under like circumstances. The fact that the Sewerage Commission is not responsible for the negligence of either of the contractors to the other adds nothing to and subtracts nothing from their liability to each other. While we have uniformly held that these agencies of the city exercising its governmental functions are not responsible for the negligence of their servants, we have never held or intimated that the negligent servants were not responsible to any one injured by their negligence. The rule exempting the public agency from responsibility, rests upon the ground that it is discharging a duty imposed upon it by law with the public funds, and that these public funds cannot be diverted from the purpose to which they are dedicated by law by reason of the negligence of the servants of the city. But the servants themselves are liable for the consequences of their own negligence just as they would be in any other employment. The master is not liable to his servant for an

injury inflicted on him by the negligence of his fellow servant. But the non-liability of the master has no effect on the liability of the servant whose negligence caused the injury. The owner of property is not liable to an independent contractor for an injury done him by the negligence of another independent contractor, but each of the contractors is liable to the other for the consequences of his own negligence. So here the non-liability of the commission affects in no manner the liability of the contractors to each other.

We, therefore, conclude that the court erred in instructing the jury peremptorily to find for the defendant, the Ferro Concrete Construction Company. We do not mean to decide that the Ferro Concrete Construction Company is liable; we only mean to decide that there was sufficient evidence to take the case to the jury, and the question of liability should be passed on by the jury. The measure of damages in such a case is the actual loss sustained as in other cases where property is flooded by the negligence of another.

The judgment as to the Sewerage Commission is affirmed, and as to the Ferro Concrete Construction Company, the judgment is reversed and cause remanded for further proceedings consistent herewith.

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### **Spradlin v. Spradlin, et al.**

(Decided May 27, 1913.)

(Appeal from Johnson Circuit Court).

1. Deeds—When Deed Will Not Be Reformed for Grantor.—A deed will not be reformed for the grantor where it was written according to his instructions and he executed it understanding its purport.
2. Deeds—When Deed Will Not Be Cancelled.—Where a deed provided that the grantee should give the grantors one-third of the crops during their lives, and should cut no timber from the land, it will not be cancelled where the grantee has cultivated the land according to the usual course of husbandry although the crops have fallen off; and it will not be cancelled for the cutting of timber which was done with the knowledge and consent of the grantors, although it provides that it shall be void if the grantee violates its stipulations.

J. F. BAILEY, C. B. WHEELER for appellant.

VAUGHAN, HOWES & HOWES for appellees.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.**

Dan Spradlin and wife on February 15, 1901, conveyed by deed to his nephew, Britton Spradlin, a part of his home place and on September 13, 1910, he brought this suit to set aside the deed. The deed was made in consideration of natural love and affection, and it was stipulated in it that Britton was to occupy and cultivate the premises and turn over annually to Spradlin and wife one-third of the products of the land; that the grantors were to hold possession of the land and the full use and control of it as long as they lived; that no timber was to be sold from the land during the lives of the grantors; and that should Britton fail or refuse to comply with the stipulations of the deed, the conveyance was to be null and void. Spradlin alleged in the petition that Britton had failed to cultivate the premises, and to turn over annually to him one-third of the products of the land; that he had sold timber from the land, and had allowed the land to go to waste and run down. By an amended petition he alleged that a part of the consideration of the deed was that Britton should treat kindly and provide for him and his wife as long as they lived; that this provision had been omitted from the deed by mistake, and that Britton had not treated him kindly or provided for him. The wife of Spradlin died some years after the deed was made. Britton filed an answer in which he controverted the allegations of the petition; proof was taken, and on final hearing the circuit court dismissed it. Dan Spradlin appeals.

The deed was drawn by an attorney at the instance of Dan Spradlin. The first draft which the attorney made did not suit him and a second draft was made conforming to his instructions. Some days later he and his wife signed and acknowledged the deed well understanding its provisions; and upon all the evidence the circuit court did not err in refusing to reform the deed on the ground that any part of the consideration had been omitted by mistake. (*Chappell v. Chappell*, 119 S. W., 218; *Lincks v. Lincks*, 141 Ky., 627).

The proof shows that Dan Spradlin and his wife had no children; that Britton was a favorite nephew, and had been induced by Spradlin to move upon his farm and live there as his tenant. After he had thus lived there with his uncle for about seventeen years, the deed was made by which a part of the farm was conveyed to

him with the restrictions above mentioned. At the time the deed was made he was proposing to move to other lands and the deed was executed to induce him to stay there with his uncle, the uncle reserving the rental of one-third of all the crops and the right to control the use of the land. Under this restriction it is clear that it was meant that Dan Spradlin had the right to direct Britton as to the manner the farm should be cultivated as he had previously done while Britton was his tenant. There was no trouble between the parties as long as Dan Spradlin's wife lived. The trouble now between them seems to have grown up since her death, and from inadequate causes. Britton seems to have cultivated the land much as other farms in the neighborhood were used, and without any complaint at the time from Dan Spradlin as to how he was managing it or direction from him to do differently. The proof fails to show any such misuse of the farm by Britton as would forfeit his rights under the deed. It is true he has cut some timber from the farm, and Dan Spradlin has cut some timber. But the weight of the evidence shows that Britton cut the timber which he cut with the consent of Dan Spradlin. Certainly the evidence shows that all that he did was done with the knowledge of Dan Spradlin and without objection on his part. We think it evident from the circumstances of the parties and their previous dealings that Britton should treat Dan Spradlin as a child would treat his father under like circumstances, and that he should in his old age care for him, and protect him as a child should care for and protect his father. The obligation also rests upon Dan Spradlin to be considerate and kind to Britton. If both will try in good faith and in kindness to live up to the deed, the bad state of feeling that has led to this controversy will soon be replaced by the old relationship between them.

Judgment affirmed.

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**Huffaker's Exr., et al, v. Michigan Mutual Life Insurance Company.**

(Decided May 27, 1913.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, Second Division).

Insurance, Life—Loan Upon Policy—Mistake—Cancellation of Premium Receipt and Note.—An insurance company agreeing to lend



the insured the reserve upon his policy upon the pledge of the policy, and accepting a note pledging the policy and executing a premium receipt by mistake when all the beneficiaries of the policy had not signed the note pledging the policy, may have the premium receipt and note canceled upon discovering the mistake if no change has been made in the mean time in the status of the parties, and the offer to rescind is promptly made, the insured falling on demand to have the note signed by the beneficiaries.

HITE H. HUFFAKER, JAMES F. FAIRLEIGH for appellants.

HENRY BURNETT, BATSON & CARY for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.**

On September 21, 1906, the Michigan Mutual Life Insurance Company issued to Joseph Huffaker of Louisville, a policy insuring his life in the sum of \$10,000, in consideration of the payment of an annual premium of \$683.10. The policy was in the usual form, the beneficiaries being his wife, Lily Huffaker, provided she survived him and in case she did not survive him, their three children. The annual premiums were paid on the policy on September 21, 1906, 1907, and 1908. The policy contained a provision that the company would make a loan on the policy for a period ending on the next anniversary of the insurance, and that it might then be renewed upon the payment of the premium and interest in advance on the loan for one year. The loan value as shown by the policy on September 21, 1909, was \$630. Prior to September 21, 1909, the insured applied to the Louisville agent of the insurance company for a loan on the policy according to its terms. The agent notified the company of the request. In answer to this letter the company wrote the Louisville agent that it would make the loan of \$630 on the policy if the fourth annual premium were paid. The letter concludes with these words:

“We will grant loan on the 21st of September of \$630.00, which with cash of \$90.90, will be sufficient to cover the following items:

“Premium due September 21, 1909, \$683.10.

“Interest on loan for one year in advance at the rate of six per cent per annum, \$37.80.

“In order to take advantage of this offer, it will be necessary for the insured to change the beneficiary from his wife and children to his wife alone unless all children have attained the age of twenty-one years.

"We enclose note to be executed by the insured and beneficiary and returned to this office accompanied by the policy named and cash of \$90.90, when we will forward for delivery with the receipt for premium, which is now in your hands, a receipt covering interest on loan for one year in advance. We also enclose form for change of beneficiary peradventure the children of the insured have not attained full age."

The agent on being informed that the three children were of age accepted from the insured a check for \$90.90 and a note signed by him and his wife which pledged the policy for the payment of the loan, and delivered the receipt for the premium to the insured. He forwarded the policy and note to the company who immediately wrote him as follows:

"Perhaps you did not understand our letter of the 30th ult., in which we stated that the insured would have to avail himself of the right reserved in the application to change the beneficiary to his wife if his children had not attained full age in order to pledge the policy as collateral to loan.

"If the children were not of age it would be necessary to change beneficiary, since they would not be qualified to join in execution of note. Being of age and beneficiaries under the policy, it is absolutely essential that they join in execution of note.

"We therefore return same herewith to be signed and acknowledged before a Notary Public by the children and returned to this office, accompanied by statement duly attested before a Notary Public setting forth the fact that the children joining in execution of note have attained the age of twenty-one years.

"Upon receipt of note completed as required, prompt settlement will be made through your office."

Upon receiving this letter the agent applied to the insured to correct the mistake which had been made, either by having his children to sign the note which pledged the policy or else to change the beneficiary as he had a right to do under the policy, and make his wife the sole beneficiary. This he declined to do saying that he had made no mistake and if the company or its agent had made a mistake it was its fault and not his. After trying in vain to induce him to correct the mistake, the company tendered back the \$90.90, which had been paid in cash, and brought this suit to cancel the premium receipt which had been given. Proof was taken and on final sub-

mission of the case, the circuit court entered a judgment on January 15, 1912, canceling the premium receipt and adjudging that as the premium had not been paid, the insurance company should issue to the insured a paid-up policy for \$920, that being the amount of paid-up insurance to which he was entitled under the statute after the payment of the three premiums in cash. To this judgment the insured excepted and prayed an appeal which was granted. After the granting of the appeal, the insured died, and the appeal before us is prosecuted by his executor, his wife and children.

According to the terms of the policy the loan was to be made upon the security of the policy which was to be pledged to the company to secure the payment of the loan. The amount of the loan was the reserve upon the policy. It was the duty of the company to maintain the reserve, and its proposition was to lend the reserve to the policy holder upon the security of the policy. If it had lent him the reserve without some security, it would have violated its duty because it was incumbent upon it to keep the reserve on its policies securely invested for the protection of its policy holders. In order too that the company might have a lien on the policy to secure the reserve, it was essential that the beneficiaries in the policy should consent to the pledging of the policy to the company. The note as accepted by the agent being signed only by the insured and his wife, was not a valid pledge of the policy; for if the wife died before her husband, the proceeds of the policy would go to the three children, and they would not be affected in that event by anything that their father and mother had done in pledging the policy to the company, the children as the beneficiaries in the policy having an interest in it contingent upon their mother dying before their father. While the letter of the company of August 30 to the agent is not clearly expressed, it means that the loan would be made upon the pledge of the policy by the beneficiaries and the insured, and if the children were not of age, the insured would have to change the beneficiaries, but if the children were of age, they would have to sign the note. The agent misunderstood the letter and accepted the note apparently upon the idea that as the children were of age, the signature of the father and mother alone was sufficient; but in doing this he made a mistake, and the company having promptly declined to accept the note in this condition, it is earnestly insisted that the company was

without remedy. If in the meantime any change had occurred in the status of the parties, there would be great force in this contention, but no change had occurred. The insured when his attention was called to the mistake did not offer to pay the premium in money and refused to change the beneficiaries or to do anything. If the agent by mistake had delivered to the insured the premium receipt and accepted from him a note signed by nobody, certainly it would hardly be maintained that the company upon promptly calling his attention to the mistake would have been without remedy. Both the parties knew the terms of the policy, and both understood that the loan was to be made upon the policy being pledged as its security. A receipt for the premium on a policy is not different from any other receipt for the payment of money. We have held in a long line of cases that a receipt being a mere acknowledgment of payment is subject to parole explanation or contradiction. (*Knox v. Barbee*, 3 Bibb. 526; *Hitt v. Halliday*, 2 Litt. 332; *Tribble v. Oldham*, 5 J. J. M., 137; *Clay v. Clay*, 2 Met. 548). The pledge of the policy to the company by one of the beneficiaries did not affect in any way those who did not sign the paper. (*Townsend v. Townsend*, 127 Ky., 230; *Meadows v. Meadows*, 13 B., 494; *Voss v. Conn. Mut. Ins. Co.*, 44 L. R. A., 689). It is well settled that money paid to the holder of a check drawn without funds, may be recovered, if paid by the drawee under a mistake of fact, unless this will prejudice the payee who has suffered damage or changed his situation in regard to his debtor by reason of the laches of the bank for its failure to return the check within a reasonable time. (*Appleton v. McGilvray*, 64 Am. Dec., 92; *Merchants National Bank v. National Eagle Bank*, 100 Am. Dec., 120). This principle has been applied in a number of cases where money was paid by mistake, although the mistake was made by the person paying it. (See cases above cited and notes thereto). In *Simpson v. Montgomery*, 99 Am. Dec., 228, a commissioner for two states by mistake described himself in his certificate of acknowledgment as commissioner of deeds for the wrong state. It was held that the mistake might be corrected in equity. We have in a number of cases upheld the power of the chancellor to correct a mistake, and to place the parties in *statu quo*, where by a mistake of law and fact, something has been done which but for the mistake would not have been done. (*Ashbrook v.*

Watkins, 3 Mon., 82; Underwood v. Brackman, 4 Dana, 313; Ray v. Bank of Ky., 3 B. Mon., 514; Cosby v. Wicklieff, 12 B. Mon., 204; Nuttall v. Nuttall, 82 S. W., 377; Knuckles v. Hughes Lumber Co., 116 S. W., 1193; Dewees v. Bozarth, 140 Ky., 14).

In the above cases and those therein cited it has often been held that a deed accepted by the grantee by mistake may be reformed or cancelled where it conveyed different property from that purchased or was otherwise ineffective as a compliance with the contract of purchase. Certainly the same principle must apply to a note or other contract. If the vendor of land who had retained in the deed a lien for the purchase money should release his lien of record pursuant to an agreement that a paid-up policy should be pledged to him, would it be maintained that he would not be entitled to a cancellation of the release of the lien if it appeared that the beneficiaries in the policy had not joined in the pledging of the policy to him, although he had by mistake not discovered this until after the policy was delivered to him? How is this case to be distinguished from that supposed? The proposition to lend the reserve to the insured upon the policy as a pledge for its security, necessarily meant that there should be a valid pledge of the policy. The parties both had in mind a loan upon the policy as a pledge to secure it, and by a palpable mistake the policy was not pledged to secure the loan. When the mistake was discovered and the insured refused to correct it, no change having been made in the status of the parties, the chancellor properly corrected the mistake and the insured standing by his refusal, the court properly cancelled the policy, as the court was without power to compel him either to make the change in the beneficiaries, or to compel the children to sign the writing evidencing the pledge of the policy.

Judgment affirmed.

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### Wilson v. Hite's Executor.

(Decided May 27, 1913.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).

1. Bonds—Supersedeas Bond Executed Before Appeal Granted—Validity of.—The clerk has no authority to accept a supersedeas

bond before an appeal has been granted, and a bond so accepted is void as a statutory bond and imposes no liability upon a surety, although it might be enforceable as a common law obligation.

2. Bonds—Surety May Execute and Leave with Clerk to be Accepted Later.—A supersedeas bond may be executed by the surety and left with the clerk under an arrangement that the clerk will accept and approve it when the appeal has been granted and he has authority to take the bond.
3. Bonds—Acceptance Necessary to Validity of—Acceptance Shown.—The acceptance and approval by the clerk of a supersedeas bond is indispensable to its validity, although it is not essential that its acceptance and approval should be shown by the record. Where the record is silent, acceptance and approval may be shown by facts and circumstances independent of the record.
4. Indemnity—Right of Indemnatee to Satisfy His Liability by the Execution of a Note.—An indemnatee who has incurred liability may satisfy the same by the execution in good faith of his note to the creditor, and assert a claim for the amount of the note against the indemnitor.
5. Indemnity—When Indemnatee May Not Assert Claim Against Indemnitor.—An indemnatee cannot assert a claim against his indemnitor on a fictitious or pretended liability, or on account of the payment of a debt that he was not legally liable for, or when he obstructs or defeats litigation through which he might be saved from loss, or by the execution of a note that is accepted by the creditor merely for the purpose of making a claim that the indemnatee may present against his indemnitor.

O'DOHERTY & YONTS and WALTER S. MENDEL for appellant.

HUMPHREY, MIDDLETON & HUMPHREY for appellee.

#### OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

In September, 1906, George E. Hazzard obtained a judgment in the Meade Circuit Court against the Louisville & Evansville Packet Co., a corporation, for the sum of \$5,000. A motion for a new trial was made in due time but was not disposed of by the court until January, 1907, when it was overruled. Thereupon an appeal was prosecuted by the Packet Co. to this court, and the judgment of the lower court affirmed.

At the time of the trial in the Meade Circuit Court, George H. Wilson, the appellant, was connected in some manner with the Packet Co., and signed as surety a supersedeas bond executed by the Packet Co., when it prosecuted its appeal from the judgment in favor of Hazzard. It appears that Wilson signed this supersedeas bond under an agreement with Hite, who was an of-

ficer and the principal owner of the Packet Co., that he would protect him against loss on account of his suretyship, and in 1908 Hite executed and delivered to Wilson the following bond of indemnity:

"THIS WRITING WITNESSETH: THAT WHEREAS, George H. Wilson became, at the request of the writer, W. W. Hite, surety on a supersedeas bond in the case of Hazzard v. Louisville & Evansville Packet Company, pending in the Meade Circuit Court, in order that said case might be appealed to the Court of Appeals of Kentucky, the said W. W. Hite being the principal owner and holder of stock in the said Louisville & Evansville Packet Company, and whereas the said W. W. Hite agreed and promised said George H. Wilson to indemnify and hold the said Wilson entirely harmless and to reimburse the said Wilson for any and all amounts that said Wilson may be required to pay by reason of said supersedeas bond:

"Now, I, W. W. Hite, for and in consideration of the premises, do hereby agree and bind myself, my executors and administrators, to pay any and all sums that George H. Wilson, or his heirs, executors or administrators may have to pay by reason of said supersedeas bond, and on account of judgment rendered in said action of Hazzard v. Louisville & Evansville Packet Company, and I agree and bind myself to see that the said George H. Wilson is held entirely harmless in said matter."

Upon the affirmance of the case of Hazzard v. The Packet Co. in this court an execution was issued on the judgment in the Meade Circuit Court but as the Packet Co. was then insolvent, the execution against it was returned "no property found." Thereupon Hazzard brought suit against Wilson in the Jefferson Circuit Court upon the supersedeas bond executed by him. While this suit was pending in the Jefferson Circuit Court, and in August, 1908, Hazzard assigned in writing to George W. Check all of his right, title and interest in the Meade County judgment, and on November 28, 1908, while the suit was yet pending, Wilson executed to Check in settlement of his liability under the judgment his note for \$6,215.15.

Sometime after this W. W. Hite died, and in the suit to settle his estate Wilson asserted a claim against the estate in the amount of the note he had executed to Check, and asked that he have allowed to him the

amount thereof out of the estate of Hite. The executor of Hite filed exceptions to this claim, and when the matter came on for hearing the lower court sustained the exceptions, and Wilson prosecutes this appeal.

The two grounds relied on by counsel for Hite's estate why the claim asserted by Wilson should not be allowed are (1) that the supersedeas bond was void and Wilson incurred no liability thereunder; (2) if he was liable, he had not suffered any loss by reason of signing it, and, therefore, could not assert any claim for indemnity against Hite's estate by virtue of the bond of indemnity executed to him by Hite.

Of course if the supersedeas bond was void, it imposed no liability on Wilson, and, therefore, Wilson could have no claim against Hite's estate on the bond executed by Hite to save him harmless, but we do not agree with counsel that the supersedeas bond was void or that Wilson did not incur any liability by signing it. The argument in support of the proposition that the bond was void is rested on the ground that it was signed by Wilson before the motion for a new trial was overruled and before an appeal was prayed or granted from the judgment in favor of Hazzard against the Packet Company.

The circumstances surrounding the execution of the bond, and about which there is no dispute, are these: Wilson, who was in Meade County when the judgment on the verdict against the Packet Company was entered, was anxious to return to his home in Louisville, and did not want to return again to Meade County for the purpose of signing as surety the supersedeas bond that the Packet Company contemplated giving to stay the judgment, pending the appeal if its motion for a new trial was overruled, and so he requested the clerk to permit him to then and there sign the supersedeas bond, but the clerk told him that as the motion for a new trial had not been disposed of, and as no appeal had been prayed or granted, he could not then accept a supersedeas bond. However, upon the insistence of Wilson that he be saved if possible another trip, the clerk told him that he would prepare the bond and let him sign it, and he, the clerk, would keep it until the motion for a new trial was ruled on, and if the motion was overruled and an appeal prayed and granted, he would then accept and approve the bond and issue an order of supersedeas thereon, staying proceedings on the judgment.



Under these circumstances, the supersedeas bond was prepared and signed by the Packet Company as principal and by Wilson as surety, and left in the possession of the clerk, and in January, 1907, after the motion for a new trial had been overruled and an appeal prayed and granted, the clerk formally accepted and attested the supersedeas bond and issued the order of supersedeas.

It is conceded that the clerk had no authority to accept the supersedeas bond in October, 1906, or until after the motion for a new trial had been overruled and an appeal had been prayed and granted, and it cannot be doubted that if the supersedeas bond had been accepted and approved in October it would have been void as a statutory bond and have imposed no liability upon the surety. *Jones v. Green*, 12 Bush, 127; *American Accident Co. v. Reigart*, 92 Ky., 142; *Leonard v. Cowling*, 121 Ky., 6371; *Asher v. Cornett*, 126 Ky., 569; *Turner v. Wickliffe*, 146 Ky., 776; *Torbitt & Castleman v. Middleboro Grocery Co.*, 147 Ky., 343.

What the liability of a surety on such a bond would be if it could be treated as a common law obligation, it is not necessary to determine, but we may observe that there are cases holding that although a bond be of no force or effect as a statutory bond, it may be obligatory upon the surety as a common law obligation. *Spooner v. Best*, 8 Ky. Law Rep., 105; *Cotton v. Wolf*, 14 Bush, 238. *Clay v. Edwards*, 84 Ky., 548.

As it conclusively appears that the bond was not formally accepted or approved in October or until the clerk did have authority to accept and approve it, the question arises, did the clerk have the right to hold the bond conditionally or as an escrow until the conditions arose that authorized him to accept it, and did his acceptance then have the same effect as if the bond had been then executed. We think there can be no doubt that Wilson in October might have left with the clerk a power of attorney authorizing the clerk to sign his name to a supersedeas bond at any time subsequent thereto when the clerk might legally take the bond, and there seems to be no material difference between what happened here and what would have happened if, in place of signing this bond and leaving it with the clerk, Wilson had signed a power of attorney and left it with the clerk. What occurred was in substance a direction by Wilson to the clerk to accept the paper as a bond when

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the time arrived that it could be so accepted. In other words leaving the paper with the clerk was in effect the same as if it had been left by Wilson with a third party to be handed to the clerk when the time for its execution arrived. Under the arrangement between Wilson and the clerk the bond merely remained in the office of the clerk as a paper without binding force or effect on the parties who signed it until it was accepted by the clerk.

Having this view of the matter, and it being the settled law in this state that a bond may be left with the clerk to become effective when certain conditions agreed on between the clerk and the signers of the bond at the time it is placed in the custody of the clerk, are complied with, we hold that the bond was a valid, statutory obligation. *Carswell v. Renick*, 7 J. J. Mar., 281; *Whitaker v. Crutcher*, 5 Bush, 621; *Smith v. Spraggin*, 109 Ky., 535.

The remaining question is, did Wilson suffer any loss or incur any liability by becoming surety on this bond? The bond of indemnity obliged Hite to "hold the said Wilson entirely harmless and to reimburse the said Wilson for any and all amounts that said Wilson may be required to pay by reason of said supersedeas bond," and "to see that the said George H. Wilson is held entirely harmless in said matter."

It will thus be observed that this bond of indemnity is as broad as language can make it. It not only indemnified Wilson against any money that he might have to pay on account of his suretyship, but also saved him harmless against any liability that he might incur. So that if Wilson has suffered any loss, or has incurred any liability by reason of his suretyship, he has recourse on the bond of indemnity to protect him from all loss or liability that he has incurred.

We have already determined that the supersedeas bond executed by Wilson was a valid obligation, and this being so, it necessarily follows that Wilson incurred a liability under this bond for the full amount of the judgment obtained by Hazzard against the Packet Company, which is the sum for which Wilson executed his note to Check. But it is insisted that Wilson, by his acts subsequent to the Hazzard judgment, lost his right to assert this liability as a claim against Hite's estate, and we will now look into this feature of the case.

It appears that a demurrer was sustained, on October 10, 1908, to the petition filed by Hazzard against Wil-

son, in which he sought to recover a judgment against him for the amount due on the supersedeas bond, and it further appears from the record that on October 17, 1908, an amended petition was filed curing the omission to state in the petition facts essential to constitute a good cause of action.

Again in October, 1908, a demurrer was filed to the petition as amended, but no ruling was made on this demurrer, nor was any step thereafter taken in the case, until January 16, 1909 when, on motion of Hazzard, the action was dismissed without prejudice. As we have heretofore stated, Hazzard, in August, 1908, assigned his interest in the judgment to Check, and in November, 1908, Wilson executed his note to Check in settlement of the judgment.

It further appears that Hite employed counsel to represent Wilson in the suit of Hazzard, and that this suit, after the execution of the note, was dismissed without prejudice, instead of being dismissed settled. It is also shown that Wilson executed the note without consulting the attorneys employed by Hite to represent him in the defense of the suit, and that he did not have sufficient property to pay the note when it was executed, and since its execution no effort has been made to collect from him any part of it.

But although Wilson, by signing the bond, had incurred a liability for the amount of the judgment that he could not escape from, it is nevertheless insisted by counsel for Hite that the facts we have recited concerning the execution of the note show that it was not executed in good faith or intended to be a bona fide liability against Wilson, but was executed merely for the purpose of giving Wilson the right to assert a claim against the estate of Hite, and without any intention on the part of either Wilson or Check that Wilson would be expected or required to pay the note.

These inferences, although entitled to consideration in determining the good faith of Wilson in executing the note and the bona fides of the transaction, are not sufficient to overcome the uncontradicted evidence that Wilson in good faith executed the note in settlement of the claim asserted against him in the suit, and that there was no arrangement or understanding at any time that he should not be liable for the full amount of it.

Nor does the fact that Wilson did not have sufficient property to pay the note at the time he executed it, or

the fact that he has not since paid it, operate to deny him the right to present the full amount of it as a valid and existing liability. When the creditor, Check, accepted the note in satisfaction of the Hazzard judgment, thereby agreeing to look to the note alone for payment of the liability, Wilson at once became invested with a right to assert the amount of the note against his indemnitor, although Wilson may not have been able to pay the note or have since paid any part of it. We can imagine a state of case in which, because of the insolvency of the payor in a note, and the improbability that he might ever be able to pay any part of it, there would really be no assumption of liability by the execution of a note; but the condition of Wilson does not justify the application of such a rule. When he signed the supersedeas bond he was a man of considerable means, and although he has since lost some of his property, may again acquire estate sufficient to pay the full amount of the note.

It should also be kept in mind that the counsel employed by Hite to represent Wilson in the suit of Hazzard could not have defeated a recovery by Hazzard, because Wilson had no defense to this suit except the one that the bond was void for the reasons urged by counsel and heretofore stated, and as this did not constitute any defense, of course judgment would have gone against Wilson when the suit of Hazzard came on for trial.

In view of these facts and the further fact that Wilson had no defense to make to the suit and that a judgment would certainly have gone against him equal to the amount of the note, it does not seem to be a material circumstance that he executed a note in the same amount that the judgment would have been given for, if the note was executed in good faith as a settlement of the liability. If a judgment had gone against Wilson in the suit of Hazzard, it could not have been successfully maintained that he had not incurred a liability in the amount of the judgment, or claimed that he should not be allowed to present a demand based on the judgment as a claim against the estate of Hite, although the judgment may have been unsatisfied and Wilson without sufficient property to pay it. And so, as the execution of the note was a bona fide transaction, and only fixed the liability in the same amount as a judgment would

have done, it created in his behalf a demand that he had a right to assert against Hite's estate.

Counsel for appellant also question the right of a surety or indemnitee to seek relief against his principal or indemnitor by the mere execution of a note in settlement of his liability for the payment of a debt due by the principal or indemnitor. But whatever the rule may be in other jurisdictions, it is well settled here that a surety who satisfies the creditor of his principal by executing in good faith his note may assert the amount for which he executed the note as a valid demand against his principal. *Stubbins v. Mitchell*, 82 Ky., 535; *Greene v. Anderson*, 102 Ky., 216; *Robertson v. Maxcey*, 6 Dana, 101; *Mitchell v. Bank of Commonwealth*, 1 Dana, 84; *Burns v. Parrish*, 3 B. Mon., 8; and in respect to the point under consideration there is no material difference between the rights of a surety and an indemnitee.

Of course a surety or an indemnitee should not be allowed to assert a claim against his principal or indemnitor arising on a fictitious or pretended liability, or on account of the payment of a debt that he was not legally liable for. Nor will a surety or indemnitee be permitted, by a settlement of a claim or demand, to obstruct or defeat pending litigation or negotiations between the creditor and the principal or indemnitor in or through which he may be saved from loss, or allowed to enter into an arrangement or agreement with the creditor by which the creditor accepts a note merely for the purpose of making a claim that the surety or indemnitee may present against his principal or indemnitor. *American Surety Co. v. Ballman*, 104 Fed., 634; *Robb v. Security Trust Co.*, 121 Fed., 460; *Wheeler v. Sweet*, 137 N. Y., 435. But the facts of this case do not bring it within the scope of any of these exceptions.

It is true that Wilson has not paid the note executed to Check, and that no effort has been made to collect it, but it is, nevertheless, a bona fide existing liability against him, and when Hite's estate is required to indemnify him against this liability, it will only be doing what Hite agreed in the bond of indemnity to do. As we have heretofore observed, the indemnity was not merely to protect Wilson against loss but to hold him harmless from liability, and while it may be true that under an indemnity limiting the liability of the indemnitor to such actual loss as the indemnitee may sustain, the indemnitee will be bound by the strict letter of the undertaking

and cannot seek redress from his indemnitor until he has actually sustained some loss. This rule cannot in fairness be applied to the bond of indemnity executed by Hite which is more than an undertaking to save Wilson from actual loss. *Lewis v. Crockett*, 3 Bibb., 196.

For the reason indicated, the judgment is reversed, with direction to proceed in conformity with this opinion.

### **Calhoun v. Commonwealth.**

(Decided May 27, 1913.)

#### **Appeal from Washington Circuit Court**

1. Intoxicating Liquors—Construction of Act of 1912—Not Unlawful to Purchase or Procure at Place Where Liquor May Be Sold.—The act of 1912 making it unlawful to purchase or procure intoxicating liquors as the agent of the seller or buyer, refers to the purchase or procurement of it in prohibited territory.
2. Intoxicating Liquors—Purchase or Procurement by Agent of Buyer.—A citizen living in local option territory may send by his agent to a place where liquor is legally sold and get it for his personal use if the agent acts without compensation and has no interest in the liquor.
3. Intoxicating Liquors—Unlawful to Purchase or Procure Through Agent in Local Option Territory.—Under the act of 1912, it is unlawful for any person to purchase or procure for another as the agent of the seller or buyer intoxicating liquors in territory where the sale of such liquors has been prohibited.

JOSEPH POLIN, JOHN A. POLIN for appellant.

C. S. HILL, JAMES GARNETT, Attorney General for appellee.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

The appellant, Calhoun, was indicted in the Washington Circuit Court for an alleged violation of section one of an act of the Legislature passed in 1912. The section reads as follows:

“That it shall be unlawful for any person, firm, or corporation to purchase or procure for another spirituous, vinous, malt or other intoxicating liquors, mixtures or decoctions either as the agent of the buyer or the agent of the seller of said liquors, mixtures or decoctions, either for or without compensation in any county, district, precinct, town or city where the sale of

intoxicating liquors has been prohibited or may be prohibited, whether by special act of the General Assembly or by vote of the people under the local option law of this State."

When the case came on for trial, an agreed state of facts was made up showing that Calhoun, who lived in Washington County, a county in which the sale of intoxicating liquor is prohibited under the local option law of the State was requested by Janes, also a resident of Washington County, to bring him a quart of whiskey from Bardstown, Nelson County, Kentucky, to which place Calhoun was going. Accompanying the request, Janes gave to Calhoun the money to pay for the liquor, and Calhoun purchased the whiskey for Janes in Bardstown, where the sale of whiskey was authorized by law, and brought it back and delivered it to Janes in Washington County. It was further agreed that Calhoun had no interest in the whiskey and did not receive any compensation from Janes or any one else for purchasing or carrying it, and that he acted merely as a matter of accommodation to Janes. From the judgment finding him guilty of violation of section one of the act, Calhoun prosecutes this appeal.

It will thus be seen that the single question presented by this appeal is, does a person who has no interest in the liquor and who does not receive any compensation for purchasing or carrying it, commit an offense under this act if, at the request of and as the agent of a citizen living in local option territory, he purchases for him at a place in this State where the sale is authorized, intoxicating liquor for his personal use and delivers it to him in local option territory. Counsel for the Commonwealth contend that the agreed facts show a violation of the act of 1912 by Calhoun. While counsel for Calhoun insist that this act only makes it an offense for the servant or agent, under circumstances such as are described in the agreed facts, to purchase or procure the liquor in local option territory or at a place where the sale of liquor is prohibited by law.

At the outset the suggestion is made that if this act attempted to deny a citizen living in local option territory the right to send an agent or servant to a place at which the sale was authorized to purchase and procure liquor for him for his personal use and not for sale or any improper or unlawful purpose, it would be an interference with personal rights of the citizens that it is not within

the competency of the legislative department of the State to regulate or control. The argument in effect, being that as the citizen has the inalienable right to go to a place where liquor is legally sold and purchase it for his own use and bring to his own home for his own use, he may do by his agent or servant what he could do in person. But the question suggested is not before us for decision in this case, as the act under consideration does not, in our opinion, deny this right to the citizen.

The first section of the act is the only one that defines or describes the prohibited acts, and when fairly construed it only forbids the purchase or procurement of liquor in the manner described in the agreed facts in "dry territory." The section makes it unlawful to purchase or procure intoxicating liquors as the agent of either the buyer or seller "in any county, district, precinct, town or city where the sale of intoxicating liquors has been prohibited or may be prohibited." It does not provide expressly or inferentially that it shall be unlawful to purchase or procure the liquor mentioned at places in this State where it may be lawfully purchased and procured. If the legislature had intended to prohibit the purchase or procuring of liquor by or through the personal agent of the purchaser at places where liquor might be lawfully purchased or procured, it appears that there would have been inserted some words indicating this purpose; as for example that it should be unlawful "to purchase or procure it anywhere in the State," or "in places where the sale of liquor was forbidden as well as where it was authorized." But the legislature carefully refrained from inserting any words that might reasonably be construed into a general prohibition and as carefully used words that limited the purchasing or procuring to local option territory.

We may further add that the history of liquor legislation in this State shows that the purpose of the legislature was to do what we have indicated it did do in the enactment of this legislation, because all the statutes on the subject of liquor regulation and control are aimed at the illegal and not the legitimate purchase, procurement, sale or possession of intoxicating liquors. In no one of the many and varied statutes that have been enacted relating to the liquor traffic has the legislature ever manifested a purpose to prohibit the citizen from purchasing or procuring for his personal use intoxicating liquor at places where liquor might be lawfully sold, or to punish



him for having in his possession, for his personal use liquor so purchased. As well said in *Martin v. Commonwealth*, 153 Ky., 784, where another phase of this act was under consideration: "The statute was aimed at the traffic in intoxicants and not the private use of them. The local option law makes unlawful the sale of intoxicants. It is not intended as a sumptuary regulation to prohibit their private use or to interfere with personal habits. The act does not make unlawful the possession of liquor; it only makes unlawful the possession for the purpose of sale."

Another reason, if one were needed, in support of the construction we have given this act, is furnished by the causes that apparently led to its enactment, and these are well stated in the opinion in *Pope v. Commonwealth*, 153 Ky., 320, where it was said, in holding that this act prohibited the purchase or procurement of liquor through an agent in local option territory:

"This legislation was evidently enacted to meet cases of the class here presented, and to prevent any one from purchasing or procuring for another intoxicants of any character, at any place in this State where the local option law is in force; and it is no defense to a charge of violation of the provisions of the act that the transaction was one of accommodation purely. Under the old statute, it was a punishable offense to purchase or procure intoxicants for pay in local option territory, but it was held not to be an offense, if the act of purchasing or procuring was simply a matter of accommodation. In the practical working of the statute, it was found to be ineffectual. Instead of preventing intoxicants from being sold in local option territory, it, in many instances, afforded protection to those desiring to violate the law. To remedy this evil, the statute above quoted was enacted.

"It is not an unreasonable exercise of the legislative power, and indeed, counsel for appellant does not so charge. It, in no sense, unreasonably abridges the right of any citizen, but, on the contrary, is calculated to relieve him of what, at times, may be a source of annoyance. It simply removes, as it were, the go-between, the middleman between the boot-legger and his customers."

The further argument is made for the Commonwealth that the last section of this act shows the legislative purpose to have been to prohibit the purchase or procurement of intoxicating liquors at any place in the State. There are only three sections in the act. The first section

we have already quoted. The second section fixes the penalty for a violation of section one, and section three reads:

“The provisions of this act shall not apply to common carriers who in good faith deliver intoxicating liquors, in quantities not to exceed five gallons, at one time, to regular licensed and practicing physicians and druggists in local option territory. Provided, however, that the provisions of this act shall not apply to such liquors prescribed on prescription from regular practicing physicians.”

But this section does not in our opinion, throw any light on the proper construction of section one, which, as we have stated, is the only section that undertakes to define or describe the offense created by the act. What the purpose of the legislature was in adding section three is not apparent from a reading of the act. It is not in any respect germane to the subject matter of section one and creates an exception to conditions that are not even remotely provided for in section one. If section one had attempted to prohibit generally the delivery of intoxicating liquor in local option territory, and assuming that it could do so, there would be some reason for exempting common carriers from the operation of section one, and providing that it should not apply to liquor prescribed by a physician, but we do not find in section one any prohibition against the delivery of intoxicating liquor, it only prohibits its purchase or procurement.

The incongruity of section three might be accounted for on the theory that section one of the act as originally introduced contained some words that, in the opinion of the draftsmen of the act, made it proper or desirable to exempt from its operation the class mentioned in section three. But however this may be, and without attempting in any manner to construe section three, which is not before us in this case, it is manifest that section three cannot be resorted to as an aid in the construction of section one. Indeed section one appears to us to be free from ambiguity and only fairly susceptible of the construction we have given it.

Wherefore, the whole court sitting, the judgment is reversed, with direction for a new trial on principles not inconsistent with this opinion.

**Carter v. Jordon, et al.**

(Decided May 27, 1913.)

**Appeal from Hickman Circuit Court.**

**Estoppel—Claim in Judicial Proceedings—Matters Concluded.**—A party who has, with knowledge of the facts and without fault of the adverse party, assumed and successfully maintained a particular position or claim in judicial proceedings, is estopped to take a conflicting position or to make an inconsistent claim, to the prejudice of the adverse party, in subsequent judicial proceedings where the parties and issues are, the same.

R. L. SMITH, H. F. TURNER for appellant.

BENNETT, ROBBINS & THOMAS for appellees.

**OPINION OF THE COURT BY JUDGE LASSING—Affirming.**

M. S. Carter instituted his equitable action in the Hickman Circuit Court against A. P. Mills, L. M. Mills, C. A. Mills, F. E. Jordon and F. C. Whayne, in which he sought to recover judgment against the Mills brothers for \$200, on a promissory note, and to foreclose a chattel mortgage on a saw mill to pay same. He alleged that Jordon and Whayne were claiming an interest in the saw mill property, and asked that they be required to set up and assert their interest.

The Mills brothers made no defense. Jordon and Whayne answered and pleaded that they were the owners of the saw mill property which plaintiff was seeking to have sold, having purchased same at execution sale. They denied that plaintiff had a lien upon said property for \$200 or any other sum; and alleged that his debt against the Mills brothers had been paid off and satisfied; and pleaded further that, in a litigation between themselves and Mills brothers, in the Hickman Quarterly Court, plaintiff had testified that his debt, which was secured by a lien upon the saw mill property, had been paid off and satisfied, and relying upon his said statement, they had purchased same; and that by reason of his conduct and statement, he was estopped from asserting a lien upon said saw mill to their prejudice.

Upon this issue, the case was prepared for trial, and, upon consideration, the chancellor was of opinion that the plea of estoppel was well taken, and he dismissed the plaintiff's petition in so far as it sought to subject the

saw mill property to the satisfaction of his debt. Plaintiff appeals.

The evidence shows that Jordon and Whayne had sued out an attachment against the Mills brothers in the Hickman Quarterly Court and caused it to be levied upon a lot of lumber, which had been sawed by the Mills brothers and was stacked up on the river bank preparatory for shipment. Appellant, claiming to have purchased this lumber, interpleaded in that action, and during the trial, which was conducted before the county judge, a jury being waived, he testified, as appellees say, that he bought this lumber from the Mills brothers, the consideration being the surrender to them by him of an open account of some \$40 or \$50 and his mortgage debt. Appellant states that in that action he testified that the contract was that he was to surrender to the Mills brothers his open account, amounting to \$40 or \$50 and that any balance received by him out of the lumber should be credited upon his mortgage debt. The decided weight of the evidence supports appellees and justified the chancellor in finding that in the trial in the quarterly court, appellant testified that the mortgage debt was satisfied in the purchase of this lumber. The evidence is clear that thereafter appellees caused the mill machinery to be sold in satisfaction of the balance of their debt, for which they had recovered a judgment in the quarterly court, which remained unsatisfied, and that at said sale they bought the mill for \$100.

On this state of facts, was the chancellor justified in holding that appellant was estopped, in the foreclosure suit, to assert that the mortgage debt had not been satisfied? In 16 Cyc., 796, the author thus states the rule:

“A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. It is necessary, however, that the claim or position previously asserted or taken should have been successfully maintained; that it should be actually inconsistent with the position presently taken, and that it should not have been taken through the fault of the adverse party.”

Applying this principle, which is supported by ample authority, to the facts in the case at bar, we find that in the suit in the quarterly court, appellant, in order to support his claim of ownership to the lumber, alleged that he had bought it and that the consideration for same was,

in part, the surrender of his claim secured by mortgage. That position is diametrically opposed to the position which he took in the case at bar, and appellees were, in no wise, responsible for his having taken such a position in the quarterly court. Again, in 16 Cyc., 799, the author states:

“A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same, and the same questions are involved. Thus a party who has successfully interposed a defense or objection in one action or proceeding cannot shift his ground and take a position in another action or proceeding which is so inconsistent with his former defense or objection as necessarily to disprove its truth.”

To the same effect are *Doniphan v. Gill*, 1 B. Mon., 199, and *Lawrence v. Lawrence*, 145 Ky., 61.

This principle applies with peculiar force to the case at bar. Appellant showed, in the suit in the quarterly court, that he had bought and paid for this lumber by cancelling his note which was secured by mortgage, and having succeeded in that litigation in relieving, to some extent at least, the lumber from the lien created by the attachment, he cannot now be heard to say, to the prejudice of appellees, that the lien was not extinguished. To so hold would permit him to perpetrate a fraud upon appellees. If the testimony of the Mills brothers is to be believed, this mortgage debt was not, in fact, satisfied by a sale of lumber, which was under attachment, but that is not the question to be determined here. It is immaterial whether the mortgage was in fact satisfied or not. The question is: May appellant, after having testified in that case that the mortgage was satisfied and in that way relieve the lumber in question from the burden of the attachment, now in another suit between the same parties, in utter disregard of his former testimony, be heard to say that the mortgage debt was not satisfied? We think not, and the chancellor correctly so held.

Judgment affirmed.

**Illinois Central Railroad Company v. Edelen.**

(Decided May 27, 1913.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, First Division).

1. Carriers—Livestock—Insufficient Facilities for Loading—Liability—Instruction.—In an action for damages for injury to livestock alleged to have resulted from the failure on the part of the carrier to furnish reasonably safe facilities for loading, an instruction telling the jury that if they believe from the evidence that the plaintiff or his agent ordered and directed the defendant to place one of its cars at the freight house instead of at the company's regular place for loading the livestock, and then and there agreed with the defendant to take charge of the loading at the freight house, plaintiff thereby adopted the means at hand at the freight house for loading the stock, and the only duty which the law imposed upon the defendant was to exercise ordinary care in so placing its car at the freight house platform as to afford the plaintiff an opportunity to load the stock into the car with reasonable safety, is erroneous because imposing upon the carrier the obligation to exercise ordinary care to place the car at the freight house platform so as to afford the plaintiff an opportunity to load his stock with reasonable safety, even though the facilities for loading were such that in the exercise of ordinary care this could have been done.
2. Carriers—Livestock—Insufficient Facilities for Loading—Liability—Instruction.—Where the shipper designates the carrier's freight house as the place for loading instead of the carrier's regular place for the loading of livestock, and agrees with the carrier to take charge of the loading at the freight house, the carrier is not liable for a failure to furnish reasonably safe facilities for loading, unless the facilities for loading at the freight house were such that, in the exercise of ordinary care, the car could have been placed so as to enable the shipper to load the stock with reasonable safety, and the carrier failed to use such care, and by reason thereof the stock was injured.
3. Pleading—Answer—Two Defenses in One Paragraph—Demurrer.—Where a paragraph of an answer contains two defenses, one of which is demurrable and the other not, it is error to sustain a demurrer to the paragraph as a whole.

TRABUE, DOOLAN & COX, C. L. SIVLEY and R. T. CALDWELL for appellant.

EDWARDS, OGDEN & PEAK for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

Plaintiff below, Allen S. Edelen, is a breeder of saddle and show horses, which he frequently exhibited at the various fairs throughout the State of Kentucky and other states. In September, 1907, he shipped several horses to Paducah to be exhibited at the Paducah Horse Show. His horses were in charge of I. C. James. In re-shipping the horses from Paducah to Louisville one of them was injured, and plaintiff brought this action against the Illinois Central Railroad Company to recover damages basing his claim on the fact that the defendant failed to furnish reasonably safe facilities for loading. From a verdict and judgment in favor of the plaintiff in the sum of \$1,400 the railroad company appeals.

The railroad company maintains in Paducah a freight depot, about 450 feet long and 70 feet wide. There is a platform on either side and at one end. The car in which plaintiff's stock was being loaded was stationed near the west end, while the approach to the platform was on the east; and to reach the car the horses had to walk down the platform the full length of the depot, and then across the end of the depot, a distance of 70 feet, making a total distance of about 518 feet. It was near midnight when the loading of plaintiff's horses was undertaken. There were no banisters along the platform, which is only about four feet wide, and although freight cars usually stood on the track parallel to the platform, yet for some distance from the east end of the platform there were no cars there on the occasion in question.

According to the evidence of plaintiff there were overhead lights along the platform, and while the mare in question was being led along the platform she became frightened and fell off and was badly injured. Mr. James, who had charge of plaintiff's horses, engaged a car and paid the freight on the afternoon of the day the horses were shipped. He advised defendant's agents that the horses would not be loaded until after they had been exhibited that evening. Plaintiff's agents say that they objected to the stock being loaded at the freight depot, but were told by a representative of the railroad company that they would have to load at that place. The mare that was injured was three-years old and standard bred. She was shown many times and was never defeated in the show ring. Several witnesses testified that she was reasonably worth on the market when uninjured the sum of \$2,500.

According to the evidence for defendant Mr. James himself requested that the car be placed at the freight depot. The agent told him that they had no facilities for loading horses at the freight house, and there was nobody there after six o'clock who could help him. Mr. James said that he wanted to load the horses at the freight depot for the reason that he did not want to load the horses until after the close of the horse show that night. The agent told him that they would rather place the car at the stock yards, where all live stock was loaded. Mr. James said "well, I unloaded my horses at the freight house, and I would like to load them out from there." On that account the agent arranged to have the car put at the freight house. The car was placed and Mr. James examined it and said it was all right. Mr. James asked for the bill-of-lading, but he told Mr. James he could not deliver the bill-of-lading until the stock was received by the company. Another agent testified that Mr. James told him that he had arranged to have the car placed at the freight platform. Stock being shipped out of Paducah were usually loaded in the stock chutes.

It is first insisted that the trial court erred in giving instruction No. 1, which is as follows:

"If you believe from the evidence that the plaintiff or his agents, ordered and directed the defendant to place one of its cars at the freight house instead of at the company's regular place for the loading of live stock, and then and there agreed with the defendant to take charge of the loading at the freight house, the plaintiff thereby adopted the means at hand at the freight house for loading the stock mentioned in the petition from the ground into the car and the only duty which the law imposed upon the defendant was to exercise ordinary care in so placing its car at the freight house platform as to afford the plaintiff an opportunity to load his stock into the car with reasonable safety; and if you shall believe from the evidence that there was an agreement of this kind between the plaintiff and the defendant, and that the defendant exercised ordinary care in so placing its car at the freight house door as to afford the plaintiff an opportunity to load his stock with reasonable safety, then the law is for the defendant and the jury should so find."

It is also urged that the court erred in refusing the following instruction offered by the defendant:



“e. The court instructs the jury that if they believe from the evidence that the defendant at the time of the accident maintained or furnished suitable and convenient stock pens or chutes for loading and unloading live stock, and that plaintiff or his agent requested that the car in which the horses were to be shipped should be placed at the freight house instead of at stock pens or chutes, the law of this case is for the defendant and the jury should so find.”

It will be observed that the instruction offered by the defendant absolved it from all liability if plaintiff designated the freight house as the place for loading, even though the facilities for loading at the freight house were such that the defendant, in the exercise of ordinary care, could have placed the car so as to enable plaintiff to load the stock with reasonable safety. On the other hand, the instruction given by the court in the event that plaintiff designated the freight house as the place of loading, imposed on defendant the duty of exercising ordinary care to place the car at the freight house so as to afford plaintiff an opportunity to load his stock with reasonable safety, even though the facilities for loading there were not such as to enable plaintiff to load the stock with reasonable safety. In our opinion neither instruction is correct. If plaintiff did designate the freight house as the place for loading, and agree to take charge of the loading there, this fact did not authorize the defendant to place the car where the stock could not have been loaded with reasonable safety, if, as a matter of fact, there were other places in the freight house where, in the exercise of ordinary care, the car could have been placed so that the stock could be loaded with reasonable safety. On the other hand, if there were no other places in the freight house where, in the exercise of ordinary care, the car could have been placed so as to enable the stock to be loaded with reasonable safety, then defendant was not liable.

On another trial the court, in lieu of instruction No. 1, will give the following instruction:

“If you believe from the evidence that the plaintiff or his agent directed defendant to place one of its cars at the freight house instead of at the company’s regular place for the loading of live stock, and then and there agreed with the defendant to take charge of the loading at the freight house, the plaintiff thereby adopted the facilities at the freight house for loading the stock in

question, and you will find for the defendant, unless you believe that the facilities for loading at the freight house were such that, in the exercise of ordinary care, the car could have been placed so as to enable plaintiff to load the stock with reasonable safety, and the defendant, in placing the car, failed to use such care, and by reason thereof the mare in question was injured, in which event you will find for the plaintiff.

Paragraph 2 of defendant's answer is as follows:

"That the contract of shipment mentioned in plaintiff's petition and the contract of shipment that was entered into between I. C. James and this defendant in writing on the 27th day of September, 1907, at Paducah, Ky., wherein this defendant received from the said I. C. James one carload of horses to be transported by it from Paducah, Ky., to Louisville, Ky., consigned to Allen S. Edelen, contained, among other things, the following stipulation:

"The cars containing the stock are to be in charge of the shipper or his agents while in transit, and the shipper assumes the duty of loading and unloading the said stock.

"That at the time that said mare is alleged to have been injured she was in the sole charge, custody and control of the said I. C. James and not in any manner whatsoever in the hands of or under the control of this defendant. That the injuries of said mare, if any, there were caused by the negligence and carelessness of the plaintiff or of his agents in charge of the horses at the time mentioned in plaintiff's petition and that said negligence and carelessness upon the part of the plaintiff or of his agents contributed to causing or did cause the injuries, if any, complained of and but for which the said injury would not have occurred.

"Wherefore, having fully answered this, defendant prays to be hence dismissed with its costs herein incurred."

A demurrer was sustained to the foregoing paragraph, and it is contended that this ruling was error. It will be observed that the paragraph sets up two defenses; (1) The agreement of the shipper to take charge of the loading and unloading of the stock; and (2) the plea of contributory negligence. The demurrer was filed to the whole paragraph. Plaintiff could have required the two defenses to be paragraphed and then demurred to each, or he could have filed partial demurrers to each part of

the paragraph. In that event it would have been proper to sustain the demurrer to any part of the paragraph that did not state a ground of defense. As it was, the demurrer went to the whole paragraph, and as the defense of contributory negligence was properly pleaded, the demurrer should have been overruled. Newman on Pleading and Practice, 2nd Ed., Sec. 565; Williams v. Langford, 15 B. Mon., 566; Archer v. National Insurance Co., 2 Bush, 226; Sun Mut. Ins. Co. v. Christ, 19 Ky. L. Rep., 305.

It is insisted, however, that the evidence fails to show any contributory negligence on the part of the plaintiff, and that the error of the trial court in sustaining the demurrer was not prejudicial. The propriety of the trial court's action does not depend on what evidence was actually introduced, but on what evidence the defendant might have introduced had the demurrer not been sustained. We cannot assume that no evidence of contributory negligence would have been introduced merely because none was introduced after the plea of contributory negligence was eliminated from the case. Manifestly the error complained of was prejudicial.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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### **Farmer, et al. v. Hampton, et al.**

(Decided May 27, 1913.)

#### **Appeal from Knox Circuit Court.**

1. Homestead—Value—Action to Partition—Evidence.—In an action by the children of an intestate against his widow to partition his lands claimed by her as a homestead, evidence examined and held insufficient to sustain the finding of the chancellor that the lands were worth more than \$1,000.
2. Homestead—Lands Included.—A tract of land distant from the home place about 300 yards which is used and cultivated by the owner in connection with his home place is included within his homestead where it, together with his other lands, did not exceed \$1,000 in value.
3. Homestead—Forfeiture—Adultery of Wife—Section 2133, Ky. Stats.—In an action by the children of an intestate to recover and partition his lands on the ground that his widow by living in adultery had forfeited her homestead therein, evidence examined and held insufficient to sustain the charge of adultery.

HIRAM H. OWENS, JAS. D. BLACK, B. B. GOLDEN and PITZER D. BLACK for appellants.

J. D. TUGGLE for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

W. H. Hampton was twice married. By his first wife he had three children, J. W. Hampton, Eliza S. Potter and Missouri Miles. Some time after the death of his first wife he married Charity Williams. By her he had eight children. Six of these children and one grandchild survived him. At the time of his death, in the year 1903, W. H. Hampton owned four tracts of land. He resided on a tract containing about fifty-six acres, and owned two adjoining tracts, one of eleven acres and one of six acres. He also owned a tract of thirty-five of forty acres, distant about 250 or 300 yards. After the death of W. H. Hampton, his widow, Charity, married James Farmer. Ever since his death his widow and certain of his children have occupied and cultivated the lands which he owned.

This action was brought by the stepchildren and children of Charity Farmer to partition the lands of which their father died seized. The action is based on the fact that the lands were worth more than \$1,000, and on the further fact that Charity Farmer had forfeited her dower and homestead under section 2133 of the Kentucky Statutes by living in adultery prior to her husband's death. During the progress of the action Simeon Hampton died, unmarried, intestate and without issue. Charity Farmer pleaded that she had inherited his interest. On final hearing the court entered judgment, finding (1) that the land in controversy was of greater value than \$1,000; (2) that the tract of land which did not adjoin the home place was not the subject of homestead. (3) that the defendant, Charity Farmer, had been guilty of adultery and was not entitled to a homestead; (4) that she had caused her infant children to leave home and seek shelter and employment elsewhere; (5) that the land be divided among the plaintiffs. From that judgment this appeal is prosecuted.

On the question of value, plaintiff J. W. Hampton, a miner by trade, who had never owned any land nor ever bought or sold any, testified that if the home place had been his when his father died he would not have taken

less than \$1,000 for it. He also said that the tract of thirty-five or forty acres ought to have been worth four or five hundred dollars when his father died. James Detherage testified that he had owned six acres of land in that community, for which he paid \$100; that after putting a small building on it he sold it for \$150. He said that all the land W. H. Hampton owned at his death was worth \$1,500. J. C. Sproul testified that he lived in the Swan Pond community twenty-five years ago, and he thought the land was worth from twelve to fifteen hundred dollars. He further said that a big portion of the land was very steep and for farming purposes he did not suppose it would be worth more than \$1,000. S. P. Ely testified that he did not know what the land was worth, and would give no estimate. William Marcum, who owned no real estate, but who lived about three miles from the land in question, testified that he had owned at one time fourteen acres of land, upon which he drilled a well and built a house and then sold for \$300. He fixes the valuation of the land in controversy at \$1,500. On the other hand, Charley West, who owned land about one mile from the Hampton land, fixed the fair cash value of the land at the time of Hampton's death at \$1,000. He didn't believe it would sell at public sale for more than \$1,000. Mr. Smith, who lived about a mile from the land, and owned 75 or 80 acres of land, fixed the value of the land at \$1,000. Luke Hampton, who had known the land from childhood, and who was raised on the farm, and who bought and sold land in the community, and who was a brother of W. H. Hampton, says that he sold his interest in the upper piece for \$175 and his mother paid W. H. Hampton \$25. In his judgment all the land his brother owned at the time of his death was not worth over \$1,000. G. P. Bain, a real estate agent at Barbourville, placed the value of the land at not over \$800. J. D. Stanfill fixed the value of the land at \$10 per acre. John Hampton, who lived on Swan Pond, testified that the land was very steep and rough, and in his opinion was not worth over \$1,000. H. T. Lambert, who owned a farm on the creek, valued the land at from five to six hundred dollars.

Upon the question of Charity Farmer's adultery it appears that about four years after her husband's death she had a son by James Farmer. Three or four witnesses testified that during W. H. Hampton's lifetime

James Farmer occasionally worked for Hampton. He was frequently around there about Hampton's house, both when Hampton was there and away. He visited just like any neighbor would and sat around and talked. It further appears that James Farmer's wife was an invalid and was jealous of him. Charity Farmer testified that prior to her husband's death she had never had any improper relations with James Farmer or any one else. The child begotten by James Farmer was born four years after her husband's death. She subsequently married James Farmer.

As to her driving her infant children away it appears that just before she married James Farmer she told her boy Simeon, who was twenty-one years of age at the time, that he would have to get a new home. After that he left, but occasionally returned to his home. The next oldest son, Nathan Hampton, said that he left home to live with his grandfather; after that he went to live with J. W. Hampton and paid his board; that his mother had frequently tried to get him to stay at home; his mother treated him kindly; his mother would often beg him not to stay in the mines. George Hampton, a boy sixteen years of age, testified that before his mother married James Farmer she told Simeon he could go away if he wanted to, but that Simeon stayed. He himself went to work for Mack Potter, but came home on Saturday nights. His mother did his washing. The older children all stayed at their mother's house until they were married and set up homes for themselves. Charity Farmer testified that she always treated her children kindly; that when Simeon talked of going away she told him he could go if he wanted to; that Nathan and George frequently returned to her home when they were not at work. Simeon was twenty-one at the time the suit was brought. Need and Joe, aged 13 and 7 years, were living with her at the time she testified.

While it is the rule not to disturb the finding of the chancellor on a question of fact where the evidence is conflicting and upon a consideration of the whole record the mind is left in doubt, yet where it is apparent from the record that the chancellor's judgment is not supported by the weight of the evidence, it will not be affirmed. *Coomes Bros. v. Grigsby & Co.*, 151 Ky., 394. While there is some evidence on the part of plaintiffs to the effect that the land of which W. H. Hampton died seized was worth more than \$1,000 at the time of his

death, yet the decided weight of the evidence of those who were qualified to pass an opinion on the question, is to the effect that the value of the land at that time did not exceed \$1,000. It appears from the record that W. H. Hampton bought the upper tract of 35 or 40 acres and his mother had a life estate therein. For a while he rented it from her, but she died in May and he died the following September. Upon her death a complete title vested in him and he used and cultivated the place in connection with his home farm after his mother died. It is not material that the upper place did not adjoin his home farm, or that W. H. Hampton did not live upon it, if, as a matter of fact, it was used and cultivated by him in connection with the place on which he lived and was a part of his homestead, and this tract with the home tracts was not worth more than \$1,000. *Gaar Scott & Co. v. Reazor*, 28 Ky. Law Rep., 1308; *Turner v. Brown's Admr.*, 128 Ky., 79. As the evidence fails to show that all of the land of which W. H. Hampton died seized was worth more than \$1,000, and as it is apparent from the record that all of his land was used and cultivated by him as a homestead, it follows that Charity Farmer was entitled to a homestead therein unless guilty of some act depriving her of that right.

Plaintiffs insist that Charity Farmer forfeited her right of homestead by living in adultery with James Farmer prior to her husband's death. It is true that she gave birth to a child by James Farmer four years after her husband died. Aside from this fact, however, none of the witnesses testified to any facts from which it could be reasonably inferred that she had improper relations with James Farmer during the lifetime of her husband. Some two or three witnesses say that they saw James Farmer there on several occasions, both when W. H. Hampton was at home and not at home. They simply say that they saw him sitting around talking. None of the witnesses claimed to have seen him in a compromising position with Charity Farmer, or to have heard any conversation between them or to have witnessed any conduct that would justify the inference that their relations at that time were improper. While adultery may be proved by circumstances, and may be inferred from the conduct of the parties, yet the circumstances and conduct of the parties must be such as to make the inference not only probable, but reasonably certain. It may be doubted if the evidence in this case is

sufficient even to excite suspicion, much less to establish the fact of adultery. We, therefore, conclude that the chancellor erred in finding that Charity Farmer had been guilty of adultery during the lifetime of W. H. Hampton.

We do not understand exactly what effect the chancellor intended by his finding of fact that Charity Farmer had caused her children to leave her home and seek shelter and employment elsewhere. We deem it sufficient to say that the evidence fails to support this finding. Some of the older children married and left to establish homes of their own. The older boys while living elsewhere always regarded her home as their home. When they wished to return they were permitted to do so and she waited on them, did their washing and attended to their other needs just as she did for the other children. The two youngest children are still with her and appear to be satisfied with their home. The homestead is for her benefit as well as that of the infant children. If the children are denied this right, the court will protect their interest.

Judgment reversed and cause remanded, with directions to dismiss the petition.

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### **Citizens National Life Insurance Company v. Murphy.**

(Decided May 28, 1913.)

#### **Appeal from Boyle Circuit Court.**

1. Insurance, Life—Contract—Liability—Want of Consideration for Note of Premium.—The application for a policy of insurance providing that no contract of insurance shall be deemed made, and no liability on the part of the company shall arise until the policy is issued and delivered to the insured in good health, no liability for the premium exists where the insured refuses to accept the policy when tendered to him, the contract of insurance never having become binding; and there is no consideration for a note executed by the insured for the premium.
2. Insurance, Life—Agreement to Accept Policy—When Not Binding.—An agreement in the application by the insured to accept the policy, if issued, being based on no consideration is not binding and he may withdraw his proposition at any time before the contract is closed.

BRUCE & BULLITT and C. C. FOX for appellants.

C. C. BAGBY, P. M. McROBERTS for appellee.



OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Affirming.

The Citizens National Life Insurance Company brought this suit against John S. Murphy. It alleged in the petition that Murphy on November 26, 1910, executed to R. B. Spurgeon and C. S. Walker a promissory note for \$544.18 payable in four months after date and bearing interest from maturity; that Spurgeon and Walker assigned the note to the plaintiff; that it was executed in settlement of the first premium due by Murphy on policy No. 17144, issued by the plaintiff on his life; that Spurgeon and Walker acted as the agent of the plaintiff in taking the note; that the policy was issued on November 28, 1910, in accordance with the application made by the defendant and was tendered to the defendant several times by its agents, Walker and Spurgeon, and that he refused to accept it; that thereafter the plaintiff, on February 9, 1911, mailed him the policy at his address, McKinney, Kentucky, and the policy was received by him through the mail and retained until August 23, 1911, when it was returned to the plaintiff. The policy was made a part of the petition. The application which is attached to the policy was dated November 26, 1910, and among other things contained the following:

"No contract of insurance shall be deemed made and no liability on the part of said company shall arise until a policy shall be issued, and be delivered to me and the first premium thereon be actually paid, all while I am in good health."

The circuit court sustained the defendant's demurrer to the petition. The plaintiff then filed an amended petition in which it alleged that the application contained this:

"I hereby declare and agree that all the foregoing statements and answers \* \* \* are offered to the company as a consideration for and as a basis of the contract with said company under my policy issued under this application which if issued I hereby agree to accept."

It alleged that the defendant without any right refused to accept the policy; that it was tendered to him while he was in good health, and that he was still in good health. The circuit court sustained the demurrer to the petition as amended and the plaintiff declining to plead further, the petition was dismissed. The plaintiff appeals.

The ground of the ruling of the circuit court was that the application of Murphy for insurance was only a proposition from him which might be withdrawn by him at any time before it was accepted and the contract closed; that under the terms of the application the contract was not closed when the company accepted the application and issued the policy; that no contract of insurance was made and no liability existed on the part of the company until the policy was not only issued but delivered to the insured; that up to this time he was at liberty to withdraw his proposition. In Bishop on Contracts, Section 325, the rule is thus stated:

"Since an offer is not a contract the party making it may withdraw it at any time before acceptance. Even though it is in writing, and by its terms is to stand open for a specified period, the result is the same. With no money consideration, and no corresponding promise from the person to whom it is made, the promise not to withdraw it has no binding force. If a consideration for the undertaking to leave the offer open is given and accepted, this constitutes of itself a contract, and the offer cannot be withdrawn."

A proposition or offer imposes no obligation on the party making it unless it is accepted by the party to whom it is made, and no obligation is then imposed unless the acceptance closes the contract, so that it is binding upon both parties; for where the promise of one is the consideration of the other, neither party can be bound unless the other is bound. (*Moxley v. Moxley*, 2 Met., 59; *Second National Bank of Ashland v. Rouse*, 142 Ky., 612.) In *New York Life Ins. Co. v. Levy*, 122 Ky., 457, the facts were these: On December 30, Levy applied to the local agent for \$10,000 of insurance to be written in two \$5,000 policies. On January 20 he paid the first premium. On the day before however the company had at its general office considered the application and rejected it for \$10,000, but approved it for \$5,000; and issued a policy thereon which was sent to the agent who delivered it to the son of the insured, the insured being dead in the meantime. It was held that there was no contract of insurance, and that there could be no recovery against the company. In *Providence Savings Assurance Society v. Elliott*, 29 R., 552, the application contained a similar provision to that above quoted, and the policy not having been delivered while the insured was in health, it was held that the contract was not com-

pleted. In *McGregor v. Metropolitan Life Ins. Co.*, 143 Ky., 488, the policy was not delivered, the language of the application being similar to that quoted above, and it was held that no binding contract had been made. In *Dickerson's Admr. v. Providence Savings Society*, 52 S. W., 825, it was agreed between the applicant and the agent that the agent would send on the application and that the applicant would finally decide when the policy came whether he would accept it. When the policy came the insured was sick and it was never delivered. It was held that there could be no recovery. A number of authorities are collected in these opinions. Those were all cases in which the insurance company was sought to be held liable; but the same rule must be applied to the insured; for the liability if any must be mutual. In *Whiting v. Mass. Ins. Co.*, 37 Am. Rep., 317, the application providing as here that the first premium must be paid before the contract was complete, the insured did not pay the premium, and it was paid by another as a volunteer. It was held that there was no binding contract. The court said:

"It is not enough that the form of the policy had been approved, for it was still optional with Fairfield whether he would by payment make it a binding contract. If he declined or neglected to pay, the company would have no claim for the premium against him, or against his estate, because the risk never attached."

The same question arose in *Hogben v. Metropolitan Life Ins. Co.*, 61 Am. St. Rep., 53, and was decided in the same way. (See also *Roger v. Charter Oak Life Ins. Co.*, 41 Conn., 97, *Mutual Life Ins. Co. v. Young*, 23 Wall., 85, 29 Cyc., 713).

In *Summers v. Mutual Life Ins. Co.*, 109 Am. St. Rep., 1009, the court said:

"There can be no doubt but that a life insurance company has the absolute right to insist that it shall accept an application and issue a policy before it shall be bound as an insurer; neither can there be any doubt of the right of one desiring or applying for insurance to require a delivery to him, and acceptance by him of the policy before he will be bound."

In a note to *Stephenson v. Allison*, 138 Am. St. Rep., 63, the learned editor, summing up a number of cases, says:

"Acceptance of the policy is the act of the insured, and is expressive of his intent to be bound by the condi-

tions of the contract in the same manner that delivery is expressive of the intent of the insurer; and is not only equally necessary, but is subject to the same limitations as are heretofore outlined with respect to delivery. Assuming that the contract is one requiring delivery to complete it, the inter-dependent relation between the two acts is such that such contract is obviously subject to the qualification that acceptance, either actual or constructive, is as necessary as a valid delivery to render it complete and binding."

When the plaintiff's agents tendered the policy to the defendant and he refused to accept it, he withdrew his offer, and his proposition was then at an end. The company could acquire no right by subsequently mailing the policy to him, when it knew that his proposition had been withdrawn.

It is true it is stipulated in the application that the assured agrees to accept the policy if issued but this was only an agreement not to withdraw his proposition before the policy was delivered, and there being no consideration for this agreement, he was not bound by it. In order for an agreement not to withdraw a proposition to be binding as shown above, it must be supported by a consideration. Here the insurance upon his life was the sole consideration of the defendant's promise to pay the note he executed. The insurance never having become binding, there was no consideration to support his promise to pay.

Judgment affirmed.

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### **Louisville & Nashville Railroad Co. v. Burkhart.**

(Decided May 28, 1913.)

#### **Appeal from Henderson Circuit Court.**

1. **Damages—Action for Personal Injuries—Negligence—Pleading—Limitation.**—In an action brought by a resident of this State against another resident thereof to recover damages for a personal injury sustained in another State through the negligence of the defendant, the plaintiff may rest the action upon a statute of such other State authorizing a recovery for such injury, by properly pleading same, but the action must be instituted within the time required by the Statute of Limitations of this State.
2. **Limitation—Statutes of Have No Extra-territorial Force.**—Statutes of Limitation are of State regulation and are founded on

State policy. Such statutes have no ex-territorial force or operation for which reason foreign jurisdictions are not bound by them; hence the doctrine in respect to the limitation of actions is that the law of the forum governs; and this is true whether the action is *ex contractu* or *ex delicto*.

3. Action—When Law of Place Governs as to Right of—Statute of State Without Ex-territorial Force.—While the statute of another State, is without extra-territorial force, a right acquired under it will always, in comity, be enforced, if not against the public policy of the State where the action is brought. In such cases the law of the place where the right was acquired or the liability was incurred, will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought; that is the *lex fori*, and not the *lex loci*, will prevail with respect to the time when the action should be commenced.
4. Limitation—Period of in Kentucky and Indiana—Action for Personal Injuries.—Although a general law of the State of Indiana fixes two years as the period of limitation for the bringing of an action to recover damages for a personal injury sustained in that State, as in Kentucky the period of limitation as to such an action is one year, in order to enable the plaintiff to recover in the latter State for a personal injury sustained in Indiana, he must bring the action within the year next after the injury was received.

YEAMAN & YEAMAN, C. H. MOORMAN and BENJAMIN D. WARFIELD for appellant.

F. J. PENTECOST and J. W. JOHNSON for appellee.

#### OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

The appellee, Fred A. Burkhart, a bridge carpenter, while in the employ of the appellant, Louisville & Nashville Railroad Company, and at work upon one of its railroad bridges in Vanderburgh County, Indiana, fell therefrom a distance of fourteen feet to the ground below, whereby his collar bone was broken and back sprained, resulting in serious and permanent injury to his person.

The accident occurred September 1, 1910, and on August 23, 1912, this action to recover damages therefor was brought by him against appellant in the Henderson Circuit Court; it being alleged in the petition that both appellant and appellee are residents of Kentucky; appellee being a citizen of the city of Henderson and appellant having been incorporated under the laws of Kentucky, having its chief office in the city of Louisville and owning a railroad running from the city of Louisville through the county and city of Henderson to Evansville,

Indiana. It is alleged in the petition that appellee's injuries were caused by the negligence of appellant and its bridge foreman in furnishing him a defective jack screw not reasonably safe for use, the rod of which slipped from its place while he was using it to raise a bridge timber, causing him to lose his equilibrium and fall to the ground.

The action was based upon a statute of Indiana which makes the employer liable in damages to the employe for an injury sustained by the latter by reason of the employer's negligence in furnishing him a defective tool or machinery for use in work required of him. Yet another statute of that State, also pleaded by appellee, provides that an action to recover damages for personal injuries may be brought at any time within two years next after the cause of action accrues.

The answer traversed the affirmative matter of the petition, except its averments as to appellant and appellee being residents of Kentucky, alleged contributory negligence on the part of appellee and pleaded the statute of limitations of Kentucky which bars an action for the recovery of damages for a personal injury unless brought within a year after the injury is received. The issues were completed by the filing of a reply which controverted the pleas of contributory negligence and limitation. The trial resulted in a verdict awarding appellee \$200 damages, and from the judgment entered thereon this appeal is prosecuted.

The record does not contain the evidence nor instructions and the single question presented for decision by the appeal is, do the pleadings support the judgment? In other words, does the limitation of two years prescribed by the statute of Indiana, or that of one year prescribed by the statute of Kentucky apply? If the latter statute should control, it is manifest that the trial court erred in refusing the peremptory instruction directing a verdict for appellant, which was asked by its counsel at the conclusion of appellee's evidence and again after all the evidence was introduced.

It appears from the petition that the action was instituted only seventeen days short of two years after appellee's injuries were received, and it is therein alleged that "the law of the State of Indiana also provides that a suit for damages resulting from said injury may be instituted at any time within two years from the date of said injury."

The answer of appellant denies the applicability of the Indiana Statute of two years, and, in the third paragraph, pleads the Kentucky Statute of one year, therefore, the question of limitation was one upon which the evidence threw no light, but a question of law to be determined from the admitted facts presented by the pleadings.

Waiving the question whether the Indiana Statute of Limitations was sufficiently pleaded by appellee, it can have no effect in this state. It is a well recognized rule that statutes of limitation are of state regulation and founded on state policy. Such statutes, therefore, have no ex-territorial force or operation, for which reason foreign jurisdictions are not bound by them; hence the doctrine in respect to limitations of actions is, that the law of the forum governs; and this is true whether the action is *ex contractu* or *ex delicto*. Minor's Conflict of Laws, section 210; 25 Cyc., 1018.

The doctrine is thus stated in Lewis' Sutherland's Statutory Construction, section 668:

"And ordinarily courts disregard the limitation fixed in the contract or tort and enforce only the *lex fori*."

Necessarily statutes of limitation affect the remedy and not the right; and, as argued by counsel for appellant, they are as much a part of the remedy as are our forms of pleading, our rules of evidence and our manner of conducting trials, hence the Indiana Statute of Limitations can have no more operation in this state upon the one than upon the other.

The rule to which we refer has always been the law in Kentucky and, among the earlier cases approving it, is that of *Graves v. Graves*, 2 Bibb., 209, in the opinion of which it is said:

"The statute of limitations does not affect the validity of the contract, but the time of enforcing it; or, in other words, it does not destroy the right but withholds the remedy. It would seem to follow, therefore, that the *lex fori*, and not the *lex loci* was to prevail with respect to the time when the action should be commenced."

The later cases show no departure from this rule, among these are the following: *Bennett v. Delaim*, 17 B. Mon., 358; *Farmers, &c., Bank v. Lovel*, 8 R., 261; *Templeton v. Sharp*, 10 R., 499; *Shilleto v. Richardson*, 102 Ky., 52; *Lobatt v. Smith & Whitney*, 82 Ky., 599; in each of which it was held that the statutory bar of the state where the remedy is sought to be enforced by action, and

not that of the state where the contract was made, governs. In a more recent case, *L. & N. R. Co. v. Whitlow's Admr.*, 114 Ky., 470, quoting with approval from *Herrick v. Railway*, 31 Minn., 16, we said:

"The statute of another state has, of course, no extra-territorial force, but a right acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought; and we think the principle is the same whether the right of action be *ex contractu* or *ex delicto*."

In the still more recent case of *Adams Express Co. v. Walker*, 119 Ky., 126, we find this expression of the same conclusion:

"It is insisted for appellant that the contract here having been made in Wooster, Ohio, it must be governed by the laws of Ohio, and that by the laws of Ohio such a limitation is valid. Limitation is governed by the law of the forum in which the suit is brought, and the courts of this state will not as a matter of comity, enforce a contract made in Ohio as to the time when the suit shall be brought, for this matter is regulated by our statutes.

Section 2516, Kentucky Statutes, fixes the limitation in such a case as the one at bar and is quite emphatic in its declaration that:

"An action for an injury to the person of the plaintiff \* \* \* shall be commenced within one year next after the cause of action accrued, and *not thereafter*."

It is true as argued by appellee's counsel, there are some exceptions to the limitation it declares, but they have no application to this case, the exceptions are found, however, in section 2541 (misnumbered 2451) and section 2542.

Section 2541 provides:

"When, by the laws of any other state or country, an action upon a judgment or decree rendered in such state or country cannot be maintained there by reason of the lapse of time, and such judgment or decree is incapable of being otherwise enforced there, an action upon the same cannot be maintained in this state, except in favor of a resident thereof, who has had the cause of action from the time it accrued."



Obviously, this section has no application to the case in hand, for it is not an action upon a judgment or decree. Section 2542 provides:

“When a cause of action has arisen in another state or country between the residents of such state or country or between them and a resident of another state or country, and by the laws of the state or country where the cause of action accrued, an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this state.”

It is equally obvious that this section can afford appellee no relief for it only applies to a case where the action is barred by the law of the state where it arose; as held in *Lobatt v. Smith & Whitney*, 83 Ky., 599, it has no reference to residents of this state but to those who are non-residents of the state and come into it in order to enforce their rights; the object of the statute being to prevent one of them from having an advantage over the other.

Nor do we think the case of *Shillito v. Richardson*, 102 Ky., 51, relied on by appellee, has any application. The parties were both non-residents of Kentucky, the plaintiff residing in Ohio and the defendant in New York, to which state he had removed from Ohio. The action was brought in Kentucky, but the cause of action arose in Ohio. The defendant answered pleading the statute of limitations of Kentucky, but by reply the plaintiff pleaded the Ohio Statute of Limitations which had not barred the cause of action when the defendant removed from Ohio to New York, and, under the laws of Ohio, did not run while he remained in New York. So, as the case was one between citizens of other states, upon a cause of action which arose in Ohio and had not been barred by the statute of limitations of that state, and the statute would have interposed no bar if the action had been brought in Ohio, it was properly held that the action could be maintained in Kentucky. In other words, the case was one to which section 2542, Kentucky Statutes, was clearly applicable.

The case at bar, however, is wholly different, for both appellant and appellee were, when the cause of action arose and have since remained, residents of this state, hence, although the cause of action arose in Indiana, section 2542, does not apply, but the case must be controlled by section 2516, Kentucky Statutes, which requires such

an action to be brought within a year next after the cause of action arose.

If the statute of Indiana, which gives the right of action attempted to be asserted by appellee, had prescribed the time within which the action to enforce the right must be brought, quite a different question from the one we have would have been presented, for, in that case, the limitation as to time would have to be treated as a part of the right and be governed by the same law that creates the right.

But the Indiana Statute in question does not prescribe the period of limitation, it is instead found in another and general statute of that state, therefore, it has no force outside of that state, and such limitation cannot be applied in Kentucky.

As said by Mr. Minor in his Conflict of Laws, section 10:

"But if the period of limitation is not prescribed by the same statute which confers the right, but is found in a general statute, the general principle applies, and it becomes a law relating to the remedy, which will have no ex-territorial force. In such case the law of the situs of the remedy (*lex fori*) again becomes the proper law." Cooley Con. Lim., 3 Ed., 361; "The Harrisburg," 119 U. S., 126; McArthur v. Goddin, 12 Bush, 274.

This question was considered and elaborately discussed in O'Shields v. Georgia Pac. R. Co., 6 L. R. A. (Old Ed.), 152, 85 Ga., 621, and by the Georgia Supreme Court held, that where a right of action is given by a statute of another state and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that state, the *lex fori* not the *lex loci* applies on the subject of limitation.

Here the appellee's petition shows a common law right of recovery; the fact that he needlessly set forth a statute of Indiana, which does not prescribe the period of limitation, will not enable him to evade the Kentucky law as to the limitation, which necessarily controls; therefore, the peremptory instruction asked by the appellant should have been given.

For the reasons indicated the judgment is reversed and cause remanded for a new trial consistent with the opinion.

**Green v. Burns.**

(Decided May 28, 1913.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, First Division).

**Master and Servant—Action for Damages—Former Opinion—Evidence Supplied—Negligence.**—In an action by a servant for damages the judgment awarding damages was reversed upon a former appeal for failure of evidence, but upon the present appeal the evidence pointed out was supplied, there is no error in the instructions and the judgment complained of was properly rendered.

JACOB SOLINGER for appellant.

EDWARDS, OGDEN & PEAK for appellee.

**OPINION OF THE COURT BY JUDGE TURNER—Affirming.**

This is the second appeal of this case, and the opinion on the former appeal will be found in 142 Ky., 710.

It is an action by appellee seeking a recovery of damages against appellant for the alleged negligence of one of appellant's employees in closing an extension table so as to mash and crush appellee's thumb.

The former opinion reversed the judgment of the circuit court, and said that a peremptory instruction should have been given because the evidence did not show that the employee knew when he closed the table that her thumb was between the leaves of the table, and did not show any fact from which that might be reasonably inferred, or that by the exercise of ordinary care he could have known her thumb was in position to be injured, and that it was absolutely necessary for plaintiff to show this before she could recover.

On the last trial the failure in the evidence pointed out in the former opinion was duly supplied, the appellee testifying that appellant's servants saw her hand in position to be mashed when he closed the table.

There is no complaint of the instructions, and in view of this testimony the court properly overruled the motion for a peremptory instruction.

Judgment affirmed.

**Louisville & Nashville Railroad Company v. Cox.**

(Decided May 28, 1913.)

**Appeal from Kenton Circuit Court  
Criminal, Common Law and Equity Division).**

1. **Verdict—Reversal of Judgment Because Excessive—New Trial—Evidence.**—Where a judgment for \$6,800 was reversed because the verdict was excessive, and in the opinion certain instructions were directed to be given upon a new trial, the evidence upon the new trial being the same as on the former trial, and the instructions given as directed, the verdict for \$2,500 will not be disturbed.
2. **Instructions—Refusal to Give Peremptory Instruction—Former Appeal—Submission.**—As to the contention by appellant that a peremptory instruction should have been given, it is sufficient to say that it was expressly held on the former appeal that the case should have been submitted to the jury.
3. **Master and Servant—Rule as to Discharge of Employees—Unwritten Rule—Absence of Notice to Employee—Instructions.**—While the former opinion indicated that there should have been an instruction as to the existence of a rule which authorized the discharge of employees who were habitually garnished, the nature of the instruction was not indicated, and for this reason the question will not be deemed to have been settled in that opinion. It would be unfair for a company to have unwritten or secret rules under which an employee might be discharged without notice, and the idea expressed in the instruction given has been approved by this court. (See 107 Ky., 233).

**BENJAMIN D. WARFIELD, S. D. ROUSE** for appellant.**F. J. HANLON** for appellee.**OPINION OF THE COURT BY JUDGE TURNER—Affirming.**

This is the second appeal of this case, the opinion on the former appeal being reported in 145 Ky., 667. The verdict on the first trial was for \$6,800 and the court after going fully into the law and facts of the case and considering every feature of it, reversed the judgment principally for the reason that the verdict was excessive; but it indicated certain additional instructions which were to be given upon a new trial.

The evidence was in substance the same as on the former trial, the additional instructions suggested were given, and the last trial resulted in a verdict for \$2,500.

It is now urged that a peremptory instruction should have been given for several stated reasons; but it is suf-

ficient to say that it was expressly held on the former appeal that the case should have been submitted to the jury.

The only new question which is suggested in the brief of counsel, which was not necessarily involved and expressly or by implication passed upon in the former opinion, is that in its instruction the court on the last trial in dealing with the alleged rule of the company to discharge its employees, who were habitually garnished required that before the jury could find against plaintiff on that ground, they must believe that he knew or by the exercise of ordinary care could have known of the existence of such a rule; it being the contention of appellant that it was immaterial whether plaintiff knew of this rule or not. It is true the court in the former opinion indicated that there should have been an instruction upon this feature of the case, but did not in terms suggest its nature, and for that reason this question will not be deemed to have been settled in that opinion.

The evidence by one of the officers of the company is that there was such an *unwritten* rule; but there is no evidence that any such rule was printed or that any publicity was given to it.

Appellee denies that he knew of, or that he had any notice of any such rule. It is apparent that it would be unfair to an employee for a company to have unwritten or secret rules under which he might be discharged when he had no notice of them; employees are not expected to obey rules or follow regulations of which they have no knowledge. If an employer may formulate secret rules by which his employees are to be guided, and claim the right to discharge an employee who is working for him under contract because of the infraction of such rules, the employees' contract of employment would be of little value to him. The idea expressed in the instruction as given has been approved by this court in the case of the L. & N. Railroad Co. v. Bock, 107 Ky., 233.

Judgment affirmed.

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### New Bell Jellico Coal Company v. Sowders.

(Decided May 28, 1913.)

#### Appeal from Bell Circuit Court.

1. Mines and Mining—Props—Where to be Furnished—Duty of Mine Owner—Subsection 7 of Section 2739b, Ky. Statutes.—It is

the duty of the mine owner to furnish props at the place where the miner is at work.

2. Mines and Mining—Props—Negligent or Willful Failure to Furnish—Action for Damages—Subsection 7 of Section 2739b, Ky. Statutes.—In a civil action for damages a person injured may recover of the mine owner for either a negligent or willful failure to furnish props as required by subsection 7 of section 2739b, Ky. Statutes.
3. Mines and Mining—Instructions.—Where the mine owner fails to furnish props but the miner nevertheless continues at work, an instruction telling the jury to find against the plaintiff on that account unless they believed from the evidence that the defective roof in the mine and the dangers therefrom were so obvious as that none but the reckless would have remained therein and proceeded to work thereunder, is erroneous and prejudicial. The correct rule is that the owner is still liable, unless the danger from the lack of props is not only imminent, but so obvious that an ordinarily careful man would not have worked under the circumstances.

WILLIAM LOW and O'REAR & WILLIAMS for appellant.

PITZER D. BLACK and BLACK, GOLDEN & OWENS for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

In this action for damages for personal injuries plaintiff, William H. Sowders, obtained a verdict and judgment against the New Bell Jellico Coal Company in the sum of \$2,000. The defendant appeals.

The action was predicated on defendant's failure to furnish plaintiff props for securing the roof of the mine where plaintiff was at work. The defendant denied the allegations of the petition and also pleaded contributory negligence.

The facts are as follows: Plaintiff and other employees were engaged in removing columns of coal commonly known as stumps or pillars, which were left in the mine to support the roof. He was at work at the time at a place from 8 to 12 feet from the last props. The props should have been about 3 feet apart. While so engaged, a large piece of slate fell and struck plaintiff, severely injuring him. It appears that the company kept its props outside of the mine at points under the incline. When the miner desired props he would go to this place, select those desired, mark them with the number of his working place and load them in the empty

cars returning up the incline. Other employees of the company would place the car of props near the drift mouth of the mine on the track ready to be hauled by the drivers into the working place indicated on the props. The drivers would then haul the props to the place indicated. On the afternoon of the day before plaintiff was injured he left his working place and went outside to select his props. Having selected and marked them he began to load them on one of the empty cars, but was advised by the drum man not to do that as that car was not going to his working place. Plaintiff remonstrated with the drum man for not taking his props in and then went back to his place of work. Shortly thereafter he came out of the mine, went down the incline and loaded his props, at the same time marking them so as to indicate where they were to be taken. The drum man stopped the car for the purpose of enabling plaintiff to load the props. After they were loaded the car was drawn up the incline and placed on a switch near the drift mouth where the driver whose duty it was to take them to plaintiff's working place could get them. The drum man told the driver that the car contained props for plaintiff's working place. Instead of taking the props to plaintiff's working place one of the drivers took them to the working place of a man by the name of Ricketts, who was employed in another entry. Ricketts, although he had not ordered any props, unloaded the props and used them at his working place. The props were marked with the figure "2" and the letter "L," designating the second left entry. The driver in taking the props to Ricketts passed by plaintiff's working place. Plaintiff's witnesses further testified that plaintiff took his pick and sounded the roof, and that he and the others inspected the roof to see if there were any cracks. His purpose in testing the roof with his pick was to see if there was any drummy slate. This was the usual way of making the test. Defendant's foreman testified that plaintiff's injury was caused by a piece of slate falling on him, and in his opinion had the roof been tested, the slate would have sounded drummy. The only exception to this is in the case of bells, kettles and horsebacks. The piece of slate in question was not of this kind.

Section 2739b, Kentucky Statutes, subsections 7 and 8. are as follows:

## Sub-sec. 7.

"Each owner, lessee or operator of every mine to which the mining laws of the State apply, shall provide and furnish to the miners employed in said mine a sufficient number of caps and props, said props to be sawed square at each end, to be used by said miners in securing the roofs in their rooms, and such other working places where by law or custom of those usually engaged in such employment it is the duty of said miners to keep the roof propped, after the miner has selected and worked the same."

## Sub-sec. 8.

"Except as herein otherwise provided, any willful neglect or failure or refusal of any owner, lessee or operator of a coal mine, or of any person employed in such mine, to comply with the provisions of this act affecting such owner, lessee, operator or person, or any attempt to obstruct or interfere with any person in the discharge of the duties imposed on such person, shall be deemed a misdemeanor, punishable by a fine of not less than one hundred dollars, and not more than two hundred dollars."

For the defendant it is insisted that it complied with subsection 7 *supra* by actually furnishing props to plaintiff at the mouth of the mine. In our opinion this was not a compliance with the statute. The props are heavy. The duty of transporting them is not imposed on the miner. His only duty is to prop the roof. The statute contemplates that the mine owner shall furnish the props at the place where they are to be used. In no other way can the purpose of the statute be effectuated. Not only so, but this was the custom of the mine. The mine foreman, Mr. Cox, so testified. This duty cannot be delegated. The negligence of the driver in failing to deliver them was the negligence of the master. 4 Thompson on Negligence, sec. 4182; White's Per. Inj. in Mines, sec. 26; Curvin v. Grimes, 132 Ky., 559.

While it is true that subsection 8 *supra* imposes a penalty only in the event of willful negligence or failure or refusal to comply with the provisions of the act, that section is applicable only in case of a criminal prosecution. Section 466 of the Kentucky Statutes provides that a person injured by a violation of a statute may recover from the offender such damages as he may sustain on of the violation, although a penalty or for-



feiture for such violation be thereby imposed. For either a willful or negligent violation of the statute in question a person thereby injured may recover damages in a civil action. In those jurisdictions where the statute itself gives a right of action only in the case of willful negligence, a different rule prevails. *Odin Coal Co. v. Denman*, (Ill.) 76 Am. St. Rep., 45.

Complaint is made of instruction No. 5, which is as follows:

"Although you may believe from the evidence that the defendant failed to provide and furnish to plaintiff the props as required by instruction No. 1, and that by reason of such failure, the place where plaintiff was at work was dangerous, and that plaintiff knew thereof, yet, you should not on that account find against the plaintiff unless you shall believe from the evidence that the defect in the roof of the mine at the place where he was and the dangers therefrom were so obvious as that none but the reckless would have remained therein and proceeded to work thereunder."

It will be observed that the foregoing instruction relieves the plaintiff from any negligence in working without the props unless the danger therefrom was so obvious as that none but the reckless would have remained therein and proceeded to work thereunder. Where the master fails to furnish props and the servant nevertheless remains at work, the correct rule is that the master is still liable for any injury caused by lack of props, unless the danger therefrom is not only imminent, but so obvious that an ordinarily careful man would not have worked under the circumstances. *Low v. Clear Creek Coal Co.*, 140 Ky., 754. Recklessness is something more than a failure to exercise ordinary care. It more nearly approaches gross negligence, which is certainly not the standard by which the employee's duty is to be measured. We are, therefore, of the opinion that the instruction did not properly present the law of the case. Plaintiff's own evidence shows that the props should not have been further apart than a man's body. He was working at a place between 8 and 12 feet from the last props. While claiming that he tested the roof and found nothing to indicate that it was likely to fall, defendant's evidence shows that had such a test been made the true condition of the roof would have been disclosed. Notwithstanding this fact he remained at work. The instruction in question presented the only defense the defendant had, yet

presented it in such a form as to excuse defendant only in the event that plaintiff was reckless. Under these circumstances we conclude that defendant's substantial rights were prejudiced.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

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**Gathright, et al. v. H. M. Byllesby & Company, et al.**

(Decided May 28, 1913.)

**Appeal from Jefferson Circuit Court  
(Chancery Branch, Second Division).**

1. **Municipal Corporations—Ordinance—When Void.**—An ordinance passed by a municipality cannot be invalid upon any other ground than its illegality. It is not within the province of the court to say that a valid ordinance is unwise or impolitic; those questions must be addressed solely to the General Council.
2. **Municipal Corporations—Ordinance—Discussion of.**—It is not for the courts to say how much discussion the General Council should allow before adopting an ordinance, or that parliamentary rules of procedure should be applied otherwise than under the ordinary rules of such procedure.
3. **Municipal Corporations—Amendment of Ordinances.**—Section 2777 of the Kentucky Statutes, which provides that no ordinance shall be altered or amended in any way except by repealing it, was intended to prevent loose legislation of doubtful meaning rather than to control parties in the exercise of their rights under existing ordinances.
4. **Municipal Corporations—Granting of New Franchise Upon Expiration of Original Franchise.**—Where a gas franchise expires, and the city is required under section 3037d of the Kentucky Statutes to sell a similar franchise, the owner of the expiring franchise is the only one that can complain if the city offers to sell a new franchise different from the one that has expired.
5. **Municipal Corporations—Power to Contract as to Existing Franchise.**—A municipality cannot, in the absence of express legislative authority, make contracts or pass by-laws which would cede away, control or embarrass its legislative or governmental powers, or which would disable it from performing its public duties; but this rule does not prevent the municipality from contracting with the owner of the franchise to waive a contract right.
6. **Municipal Corporations—Power to Contract.**—Where, under the charter of a gas company, the city had the right to purchase the plant at the expiration of the charter, the city has the power to grant a new franchise and to postpone the purchase of the plant until the expiration of the new franchise.

7. **Municipal Corporations—Power to Contract for Future Maximum Rates for Electricity.**—Where a municipality expressly reserves the right to make reasonable regulations of rates for electricity, an ordinance which provides that the city will, in the future, pass an ordinance fixing maximum rates for electricity to which the owner of the franchise to furnish electricity agrees, the ordinance is not illegal upon the ground that it undertakes to commit the General Council, in advance, to certain maximum rates, since the General Council may, at any time, fix other rates provided they be reasonable.
8. **Public Policy—How Expressed.**—The public policy of a State is expressed in its Constitution and Statutes, and in its common law as found in the opinions of its court of last resort; and if the Constitution or Statutes speak upon a subject, the public policy of the State is fixed to that extent.
9. **Municipal Corporations—Contract—Public Policy.**—The act of a municipality which has the sanction of law, cannot be against public policy.
10. **Trusts—Pools—Subject to Fine Only.**—Under the Act of 1906 (Kentucky Statutes section 3941a), known as the "Pooling Statute," and which amended the Act of 1890 (Kentucky Statutes, 3915 to 3941 inclusive) against "Pools, Trusts and Conspiracies," there is no prohibition against the formation of trusts or pools in Kentucky, since the Act of 1906 merely provides a fine against trusts and pools in case they sell their products above or below their real value.
11. **Municipal Corporations—Franchise to be Sold After "Due Advertisement."**—Under section 164 of the Constitution, which provides that a municipality can only sell a franchise "after due advertisement," the court cannot question the good faith of the council in fixing the length of the advertisement at not less than two weeks, and in two different newspapers.
12. **Municipal Corporations—Sale of Franchise—Highest and Best Bidder.**—Under section 164 of the Constitution, which requires all franchises granted by a municipality to be sold publicly to the highest and best bidder, an ordinance which is so drawn as to confine the bidding to one person is invalid.
13. **Municipal Corporations—Sale of Franchise—Exclusive Bidder.**—The mere fact, however, that one bidder has, by reason of his ownership of an existing franchise, or his capital, an advantage over other bidders, does not make him an exclusive bidder within the rule above laid down.
14. **Municipal Corporations—Franchise May be Confined to Territory Already Occupied.**—The fact that an ordinance for the sale of a gas or electric franchise is drawn so as to cover only territory already occupied by the pipes or wires of an existing company, will not invalidate the ordinance.
15. **Municipal Corporations—May Waive Franchise Provision.**—A provision in the franchise of an electric company prohibiting it from selling out to a competitor may be waived by an agreement be-

tween the owner of the franchise and the municipality that granted it.

16. **Municipal Corporations—Waiver of Franchise—Exclusive Bidder.**—Where the franchise of an electric company prohibited it from selling out to a competitor, and the municipality offered to sell a natural gas franchise, and agreed to waive the prohibition in favor of the competitor of the electric company in case it should buy the natural gas franchise, the ordinance offering the natural gas franchise for sale did not violate the rule against exclusiveness in public bidding, since the waiver merely put the competitor upon an equal footing with other bidders.

**WEHLE & WEHLE, W. W. THUM, C. C. HEATT, JOHN H. CHANDLER and HENRY M. JOHNSON** for plaintiffs.

**PENDLETON C. BECKLEY, J. W. S. CLEMENTS and STUART CHEVALIER** for City of Louisville, et al.

**O'DOHERTY & YONTS** for Kentucky Heating Company.

**A. J. CARROLL** for Kentucky Electric Company.

**HUMPHREY, MIDDLETON & HUMPHREY** for H. M. Byllesby & Company, et al.

#### **OPINION BY JUDGE MILLER—Dissolving Injunction.**

This injunction suit was brought by J. B. Gathright and fourteen other citizens and taxpayers of the city of Louisville, against "H. M. Byllesby & Company," incorporated, the Louisville Gas Company, the Kentucky Heating Company, the Kentucky Fuel Gas Company, the Louisville Lighting Company, the Kentucky Electric Company, the city of Louisville, W. O. Head, Mayor of the city of Louisville, Pendleton Beckley, attorney for said city, and John D. Wakefield, M. W. Neal, and James G. Caldwell, constituting the Board of Public Works of the city of Louisville, to enjoin the sale of a franchise for furnishing natural gas, manufactured gas and mixed gas to the city of Louisville and its citizens as provided by an ordinance of the city of Louisville approved March 29, 1913, and for other ancillary relief.

An understanding of the case requires a somewhat extended statement of the facts upon which the action is based.

Two ordinances were passed by the General Council of the city of Louisville, the first on March 27, 1913, and the other on March 28, 1913. Both were approved by the Mayor on March 29th. One ordinance provides

for the sale of a franchise for furnishing natural gas, manufactured gas and mixed gas to the people of Louisville, while the other ordinance provides for the execution of a contract between the city of Louisville and "H. M. Byllesby & Company," which controls and operates certain companies engaged in the furnishing of gas and electricity in said city. The proposed contract, among other things, requires H. M. Byllesby & Company to bring natural gas into the city of Louisville; fixes maximum rates to be charged therefor, and defines certain rights of the city with reference to said companies. As above stated, this action seeks to prevent, by injunctive process, the carrying out of the plan contemplated by said ordinances.

Pendleton Beckley, attorney for the city of Louisville, is also made a defendant, and an injunction is sought against him to prevent a dismissal of the case of the city of Louisville against the Kentucky Electric Company now pending in the Jefferson Circuit Court and which will hereinafter be noticed.

The chancellor granted the relief asked, and enjoined further action under said ordinances; whereupon the defendant entered a motion before me, one of the judges of the Court of Appeals, to dissolve that injunction, as is provided by the Civil Code of Practice. On account of the importance of the questions involved, the case was heard by five of the judges of the court, in order that the decision might be the decision of the court rather than the opinion of a single judge thereof.

The injunction is asked upon the ground that the General Council of the city of Louisville was without authority to pass said two ordinances, or at least one of them.

Preliminary, however, to a discussion of the law of the case, it may be profitable, if not necessary, to consider the gas and electric light situation in Louisville. At present there are two gas companies and two electric light companies operating in Louisville. The Louisville Gas Company was chartered in 1838, for a period of thirty years. A new charter was granted it in 1868, for a period of twenty years; and in 1888 it obtained a third charter extending its existence for a term of thirty years. Its present charter will, therefore, expire on January 1st, 1919, and the city will then have the right to buy the gas plant if it should then conclude to take over the plant and to go into the business of furnishing

gas to its customers. By the terms of its existing charter the Louisville Gas Company is required to furnish illuminating gas, of a fixed candle power, at a rate not to exceed \$1.35 per 1,000 cubic feet. This price, however, has been reduced from time to time, so that illuminating gas furnished by the Louisville Gas Company is now selling at the price of \$1.20 per 1,000 cubic feet, with a twenty cents discount for prompt payment, leaving the net price of \$1 per 1,000 cubic feet. By its present charter the Louisville Gas Company is required to sell non-illuminating or fuel gas at a price not to exceed fifty cents per 1,000 cubic feet; but as the Louisville Gas Company had only one system of pipes, it could, of necessity, furnish only one kind of gas either for illuminating purposes, or for fuel. Accordingly, the charter of the Louisville Gas Company was amended so as to make it optional with the company to furnish non-illuminating or fuel gas. Since this amendment, the Louisville Gas Company has furnished its illuminating gas for heating purposes at eighty cents per 1,000 cubic feet, with the discount, which brings the net price down to seventy-five cents per 1,000 cubic feet. In consideration of the various restrictions upon the price of its product, and of certain duties imposed upon that company, the Louisville Gas Company was given the exclusive right to furnish illuminating gas, it being provided, however, that the exclusive feature of the charter should not prevent the legislature from permitting other companies to furnish natural gas. Consequently, in 1885, the Kentucky Fuel Gas Company was chartered, for the purpose of furnishing artificial, fuel or heating gas; and in 1888 the Kentucky Rock Gas Company was chartered, for the purpose of furnishing natural gas to the city of Louisville. These two last-named franchises passed under the control and ownership of the defendant, the Kentucky Heating Company. Shortly thereafter, the Louisville Gas Company brought suit to enjoin the Kentucky Heating Company from selling natural gas for illuminating purposes, and natural and artificial gas for heating purposes. The final judgment in that extended litigation determined that the Kentucky Heating Company had the right to furnish natural gas for either illuminating or heating purposes, and mixed gas for heating purposes only. *Kentucky Heating Company v. Louisville Gas Company*, 23 Ky. Law Rep., 730, 63 S. W., 751. The price originally charged by the Kentucky

Heating Company for natural gas was much lower than that charged by the Louisville Gas Company for artificial heating gas; but, as the supply of natural gas diminished, the Kentucky Heating Company was compelled to manufacture more of its heating gas, with the final result that its price was raised to a net price of sixty-five cents per 1,000 cubic feet. Neither the charter of the Kentucky Rock Gas Company nor the ordinance of the city of Louisville, fixed a price at which that company should sell its product; and the same was true as to the charter of the Kentucky Heating Company.

In a recent action between the city of Louisville and the Kentucky Heating Company, it was determined that the Kentucky Heating Company's franchise to use the streets of the city of Louisville for supplying its product, had expired on August 11, 1908; but in the same judgment it was further held that under section 3037D, of the Kentucky Statutes, the city of Louisville must offer for sale a franchise of a character similar to that heretofore held by the Kentucky Heating Company before the city would be permitted to exclude that company from the use of its streets.

It will thus be seen that as to the gas situation in the city of Louisville, the franchise of the Kentucky Heating Company has expired, and that of the Louisville Gas Company will expire within less than six years. Under this state of affairs, the Mayor and the General Council of the city of Louisville deemed it incumbent upon them to take some action which, in their opinion, would be best for the citizens of Louisville. One of the principal benefits which they have sought to obtain in readjusting and continuing a gas franchise for the city of Louisville was the introduction of natural gas into the city from the natural gas fields of West Virginia, which, by most experts in that line, are thought to contain the largest supply of natural gas in this country. It is estimated that it will cost not less than three million dollars to pipe natural gas from West Virginia to Louisville.

Turning now to the electric light situation in Louisville, we find it to be substantially as follows: The use of electricity for lighting purposes upon a large scale, and particularly for lighting of streets and public places, is of comparatively recent date; and when the Louisville Gas Company found that electric light was rapidly taking the place of gas light, it procured an amendment to its charter authorizing it to engage in the business of

furnishing electricity for light and power, which it was permitted to do, either directly or through the purchase of stock of companies having the charter power to furnish electricity. Acting under this authority, the Louisville Gas Company became the owner of a majority of the stock of the Louisville Lighting Company, which owned a franchise granted prior to the adoption of the present Constitution, empowering it to erect its poles and lines along the highways of the city of Louisville, and without limit as to time, or, as to price. The franchise of the Louisville Lighting Company is, however, in no respect exclusive; and, since the adoption of the present Constitution in 1891, the city of Louisville has sold certain other franchises, authorizing the buyers to manufacture and sell electricity for heat, light and power. Two of these franchises were restricted to very narrow areas—one known as the Campbell Electric Company franchise was used in connection with the ownership of the Fifth Avenue Hotel, and extended through a single block; while the other franchise owned by the Geo. G. Fetter Lighting & Heating Company, embraced only a few blocks in the central or business portion of the city. In 1907, however, a much larger franchise was sold to the Kentucky Electric Company. This franchise required the purchaser to be ready to supply a district covering approximately a square mile, and to be ready to serve outlying districts if and when a certain profit should be guaranteed to it. By the terms of this franchise the price of electricity for lighting was fixed at a maximum of nine cents per k. w. h., and for power at a maximum of four cents per k. w. h.

Section six of the franchise bought by the Kentucky Electric Company, reads as follows:

"Section 6. The company shall not sell out to, make joint stock with, or pass under control of any competing company, nor shall it by any device enter into any arrangement which will prevent bona fide competition in the furnishing of electricity, and in case the company shall violate this section, the franchise herein granted shall become void."

The Kentucky Electric Company built an extensive plant, and has ever since been engaged in supplying electricity to consumers in a large district in competition with the Louisville Lighting Company. These competitive conditions have existed between the Louisville Lighting Company and the Kentucky Electric Company



for some years, and necessarily led to a decided reduction in the price of electricity to those consumers who were within the competitive district. As above stated, however, the Louisville Lighting Company is not restricted as to the price it shall charge, while the Kentucky Electric Company is restricted by its franchise to a maximum of nine cents for light, and to four cents for power. In many cases electricity is now furnished to large consumers, by both companies, at much less than the maximum rates of the Kentucky Electric Company.

"H. M. Byllesby & Company" is a corporation engaged in the business of buying and operating public utility companies, and especially gas and electric light companies. Until July, 1912, the city of Louisville owned 9250 shares, or not quite one-third of the capital stock of the Louisville Gas Company. During the year 1912, "H. M. Byllesby & Company" bought from individuals a very large proportion of the stock and from the city of Louisville in the Louisville Gas Company. It thereby acquired a controlling interest in that company. "H. M. Byllesby & Company" also acquired the stock or property of the Campbell Electric Company, and of the Geo. G. Fetter Lighting & Heating Company. The result was, that at the time of the passage of the ordinances which are the basis of this controversy, in March, 1913, "H. M. Byllesby & Company," or those associated with it, owned substantially all the stock of the Louisville Gas Company, which company in turn owned a majority of the stock of the Louisville Lighting Company. Furthermore, H. M. Byllesby & Company and its associates own substantially all of the minority stock of the Louisville Lighting Company, as well as the stock in the Campbell Electric Company and in the Fetter Company.

In handling the situation presented by the expiration of the franchise of the Kentucky Heating Company, and the approaching expiration of the franchise of the Louisville Gas Company, the Mayor of Louisville conceived the idea that it would be of great public advantage to bring about (1) the introduction of natural gas into the city of Louisville; (2) at the same time to fix the price at which this gas should be sold; (3) bring about a reduction of the price to be paid by the city of Louisville for its public lighting; and (4) a similar reduction to private consumers for electricity for light and power. After H. M. Byllesby & Company and its

associates had bought the stock of the Louisville Gas Company from the private owners thereof, and before it had bought the stock of the city of Louisville in said company, the Mayor came to the conclusion that "H. M. Byllesby & Company" was about to buy the stock of the Kentucky Electric Company in violation of section six of the franchise of that company, which expressly prohibited it from selling out to a competing company, as above set forth. The Mayor, therefore, caused a suit to be instituted on June 7, 1912, in the name of the city against the Kentucky Electric Company and sundry defendants, and asked, by way of final relief, that by no device of any kind should the Kentucky Electric Company pass under the control of its competitor, the Louisville Gas Company which owned a majority of the stock in the Louisville Lighting Company, or to any one owning or controlling said companies. That suit was successful in the circuit court, and a decree was entered pursuant to the prayer of the petition. A motion was timely entered for a rehearing and that motion was submitted, but had never been disposed of at the time this action was bought.

Subsequently, in July, 1912, as above pointed out, the city of Louisville sold its stock in the Louisville Gas Company to H. M. Byllesby & Company for \$150.00 per share, aggregating about \$1,387,500, which has been paid to the city.

As a result of prolonged negotiations between the city of Louisville and H. M. Byllesby & Company, the two ordinances in question, dealing with the future gas and electric situation in Louisville, were passed and approved in March, 1913; and it is the carrying out of the purposes of those ordinances that this action seeks to enjoin. It becomes necessary, therefore, to state as briefly as may be possible, the leading provisions of said ordinances, in order that the objections of the plaintiffs thereto may be fully understood.

The first ordinance creates a franchise for the distribution and sale of natural gas, manufactured gas, and mixed gas for heat and lighting and other purposes. The purchaser, who is styled the grantee in the language of the franchise, is authorized to use the public ways of the city for the purpose of laying and operating a system of mains and pipes, ample provision being made for the restoration of the streets that may be opened in the course of the work.

The sixth section requires that the grantee shall, within sixty days after the acceptance of the ordinance, begin and continue to lay a main line or lines of pipe from the most available source of supply of natural gas in West Virginia to the city of Louisville, and that said main line shall consist of continuous piping capable of withstanding a pressure of 350 pounds per square inch, and of a size and capacity for supplying twelve million cubic feet of gas per day to said city. Said sixth section further provides that said grantee shall complete said line or lines of pipe within one year from the passage and acceptance of the ordinance, and shall immediately thereafter commence to supply natural gas to consumers in said city up to the capacity above mentioned, and that said supply of twelve million cubic feet per day shall not be reduced by reason of any connections with said pipe being made between the city of Louisville and the source of supply. And for the purpose of securing the completion of said line, said sixth section further provides that the grantee shall execute a bond to the city of Louisville, with good surety, in the sum of \$25,000.00.

The seventh section requires a further bond of \$50,000 from the grantee for the faithful performance and discharge of all the obligations imposed by the ordinance, including the obligation imposed by section six above quoted.

By section eight the quality of the natural gas, or natural and manufactured gas, or manufactured gas to be furnished, is required to be not less than seven hundred British thermal units to the cubic foot; and the pressure at no time shall be less than three ounces nor more than twelve ounces to the square inch at the point of consumption. These facts are to be ascertained by the gas inspector of the city of Louisville, and in case the quality of gas furnished shall, in any month, for an aggregate period of seventy-two hours, fall below the standard above fixed, then the bills for that month, of all consumers, shall be reduced directly in the proportion that the gas furnished falls below the quality of the gas contracted for, as above specified.

Section nine requires the grantee to furnish, at his own expense, service pipes from his mains to the property lines; and, at the grantee's expense to supply, place and maintain all gas meters, which shall be of a standard make, and which shall, at all times, be subject to a reasonable system of inspection to be provided for by

ordinance of the city of Louisville. Section nine further provides for the employment of a competent chemist or gas inspector by the city of Louisville to inspect meters, and to test the pressure and quality of the gas furnished by the grantee at least once a day, and to analyze the gas furnished for added dilutents or impurities.

Section ten of the ordinance fixes the maximum price at which the grantee of the franchise shall furnish gas to consumers for light, heat and other purposes, after natural gas is first furnished as above required. This maximum price is fixed by a sliding scale, beginning with forty cents for the first one hundred cubic feet per month, and ending with \$1.33 for two thousand cubic feet per month. All additional gas over the first two thousand cubic feet per month shall be furnished at a rate not exceeding 38.88 cents per thousand cubic feet, and consumers are allowed a discount of ten per cent. for prompt payment. By this sliding scale all gas in excess of two thousand cubic feet per month is to be furnished at a net price of 35 cents per thousand cubic feet. And, in order to secure equality of rate to all consumers alike, section ten contains this further provision:

"The grantee may also make special contracts with consumers at rates based upon the amount of gas used and the conditions of the contract, which special rates may be less than those charged to consumers taking a small amount of gas or taking gas under different conditions, but said special rates shall be the same to all consumers using a like amount of gas under the same contract conditions.

"A schedule of such special rates and contract conditions shall be filed with the Board of Public Works and each and every change therein shall also be filed with the Board of Public Works and be open to public inspection. But if the demand from special rate consumers threatens the general supply the grantee may shut off the supply from special rate consumers in whole or in part and if the grantee fails or refuses to do so the General Council may by ordinance require the grantee to do so."

Section eleven is administrative in its features, and reserves to the city the right of making changes and extensions of the public lighting service.

Section twelve recites that the object of the franchise created is to make available for the people of Louisville

natural gas at the rate commensurate with the cost of natural gas to the people of other cities similarly situated, and below the cost of manufactured gas; and requires the grantee to take all reasonable precautions and measures necessary to furnish natural gas during the life of the franchise. It further provides, that in the event the grantee shall, through no fault of his own, be unable to supply natural gas in sufficient quantities to meet the demand for same, and it shall become necessary to use a material quantity of manufactured gas, the rate for such mixed or manufactured gas shall be a reasonable rate, to be fixed by the General Council, which the grantee binds himself to accept. The thirteenth, fourteenth and fifteenth sections all contain administrative features relating to the operation and construction of the grantee's plant, and are not made the grounds of any objection.

The sixteenth section authorizes the grantee to acquire the ownership, use or control, by purchase or otherwise of the plant of the Louisville Gas Company and of the Kentucky Heating Company, the last clause thereof reading as follows:

"And the right of the city of Louisville to purchase the property of the Louisville Gas Company at the expiration of the charter of said Louisville Gas Company is reserved, but said right is deferred until the expiration of this franchise if the property of the Louisville Gas Company is used under this franchise as set forth above."

The seventeenth and eighteenth sections are administrative in their nature, and need no special comment.

Section nineteen provides that the franchise created by the ordinance is subject to the exclusive privilege in the charter heretofore granted to the Louisville Gas Company; while section twenty limits the franchise to a period of twenty years, as required by the Constitution.

By section twenty-one the city is allowed to acquire the plant of the owner of the franchise at the expiration of its term, and prescribes the procedure to be taken for that purpose.

Section twenty-two provides that the city gas inspector, or other agents or inspectors to be appointed by the Mayor, shall have the right to examine the books, papers, contracts, obligations and agreements of the grantee, and also all of its physical property and equipment which it may use in the operation of its business.

Section twenty-three of the ordinance reads as follows:

"Nothing in this ordinance contained shall be construed as exclusive or as preventing the city of Louisville from granting a like franchise or privilege to any other person, firm or corporation."

The remaining four sections of the ordinance provide for its advertisement, sale, up-set price, and forfeiture in case the successful bidder should fail, within forty days after his bid has been accepted, to comply with the provisions of the ordinance.

Turning now to the other ordinance, which is commonly called the "Contract Ordinance," it will be seen that its preamble describes it as an ordinance authorizing the Mayor to enter into a contract with "H. M. Byllesby & Company" with reference to certain public utility companies operated in the city of Louisville, naming them. The ordinance does not content itself with authorizing a contract along general lines, but sets out *verbatim* the contract which the Mayor is authorized to make. We have, therefore, in advance, the terms of the proposed contract. By its preamble it recites that the city of Louisville is desirous of obtaining for the use of its citizens a larger supply of natural gas, and to secure for its citizens the benefits to be derived from obtaining such natural gas at a price lower than the cost of a manufactured gas, and for that purpose it intends to offer for sale the franchise hereinbefore examined at length, providing for furnishing such a supply of gas. It further recites that "H. M. Byllesby & Company" controls a majority of the stock of the Louisville Lighting Company, and is desirous of obtaining the physical properties of the Kentucky Electric Company, and is willing to bid for the natural gas franchise and to bring natural gas to Louisville and furnish the same to its citizens, and that the city of Louisville is desirous of fixing a maximum rate at which electricity shall be furnished to the city of Louisville. In consideration of the privileges therein granted to "H. M. Byllesby & Company," and of the permission of the city of Louisville to H. M. Byllesby & Company to acquire the physical properties of the Kentucky Electric Company, and operate the same in conjunction with the Louisville Lighting Company, the city of Louisville on the one hand, and "H. M. Byllesby & Company" on the other, agree in substance as follows:

1. The city will create and forthwith offer for sale a franchise for the furnishing of natural gas and manufactured gas in the form above given.

2. The city consents that "H. M. Byllesby & Company" may acquire the capital stock and property of the Kentucky Electric Company, and in the event of such acquisition, the city releases the Kentucky Electric Company its stock and its property from the prohibitions contained in section six of the franchise of that company, which prohibits it from selling out to any competing company, and which has been heretofore copied in full in this opinion; and,

3. The city further agrees to dismiss the action hereinbefore referred to, in which it had enjoined the Kentucky Electric Company from selling out to "H. M. Byllesby & Company," and which was then pending upon a motion for a re-hearing; but that it would not do so until "H. M. Byllesby & Company," or some corporation controlled by it, became the purchaser of the natural gas franchise provided for, and executed the bonds in the franchise provided for, and executed the bonds in the sum of \$300,000, as required by sections six and seven of the franchise.

Upon its side, "H. M. Byllesby & Company" agree (1) to bid the up-set price of \$25,000 for the natural gas franchise; (2) in the event it should acquire the same, to carry out the terms of the franchise and bring natural gas to the city of Louisville and furnish the same as therein provided; and (3) to cause the Louisville Lighting Company, in the event that company acquires the property of the Kentucky Electric Company, or to cause any corporation which shall acquire the franchise or property of both these companies, to furnish electricity for lighting and power purposes to the inhabitants of the city of Louisville at a price not to exceed the rate set out in the ordinance. Those rates are specifically set forth, and are upon a sliding scale, the highest price being 7.61 cents net for quantities under 500 k. w. h., and 4.75 cents net for quantities above 500 k. w. h., and power at a maximum of four cents.

Section three of this ordinance has a provision similar to that contained in the gas ordinance requiring all rates to be uniform for equal service, and requiring the rates to be filed with the Board of Public Works and open for public inspection.

There is a further provision that the company shall furnish to the city of Louisville street lamps and elec-

tricity therefor at a price not to exceed \$60 per lamp per year where the current is supplied from an underground conduit, and, \$56 per lamp per year where the overhead current is supplied.

The city uses 226 lamps which are supplied from an underground conduit, and 2539 lamps from an overhead current.

The ordinance then contains these provisions:

"The above rates regarding street lamps are based upon current consumption and the cost and maintenance of fixtures and such changes or regulations may be made from time to time as may give the city the advantage of any inventions or improvements.

"Third. The city of Louisville reserves the right to make reasonable regulations of rates for the use of electricity and for lamps for both private consumers and municipal purposes and the capital stock or bond issue of said company shall not be considered in fixing said rates."

The remaining provisions of this ordinance are not material to this discussion.

The result of these two ordinances as to franchises and rates, when compared with the present situation in Louisville, may be summarized as follows:

The city is now paying \$67 per lamp per year for public lighting, or an aggregate of \$185,255.00. At the new rates of \$60 and \$56 per lamp per year, it will pay \$155,744 for the same service, making an approximate saving of \$30,000 per year for this particular service. The consumers of gas are now paying a dollar per 1,000 cubic feet for illuminating gas, and for heating gas, 75 cents to the Louisville Gas Company, or 65 cents to the Kentucky Heating Company. On the other hand, natural gas is to be furnished under the proposed ordinance at a maximum net price of 35 cents per 1,000 cubic feet in quantities of 2,000 cubic feet per month, and on a sliding scale for smaller quantities. This natural gas can be used for illuminating purposes through the medium of mechanical appliances, like the Welsbach Burner; and while it is not practicable, or perhaps not possible to now estimate the reduction or the saving to the people in the use of natural gas, it is fair to assume that it will be substantial. Defendants estimate the saving to the consumers will be more than a million dollars annually.

The price for electric lighting to the smallest consumer will be 7.60 cents, whereas, under the Kentucky



Electric franchise 9 cents can be charged; and for consumers of more than 500 k. w. h. the price will be 4.75 cents, a saving of nearly one-half from the maximum price under the Kentucky Electric franchise.

As before stated, the Louisville Lighting Company is not now restricted in its charge for electricity.

Furthermore, the city reserves the right, should natural gas fail, to fix the price at which manufactured gas shall be sold, and it further reserves to itself the right to fix the price of electric service, the rates prescribed in the ordinance being maximum rates, and not binding upon the city if it should turn out that they are unreasonably high.

In addition to all this, the city is at liberty at any time, to grant other franchises, either for the furnishing of gas or for the furnishing of electricity, and it reserves the right, which it now has, of buying the gas plant at the expiration of the franchise.

It has been suggested in argument that the question here presented is one of power only in the General Council of the city of Louisville, and that judicial tribunals are not concerned with the results arising from exercise of an existing power. That is true, and the plaintiffs have rested their argument, as they necessarily must upon the want of power and authority in the General Council of the city of Louisville to enact these ordinances, or to authorize the contract above referred to; but, in order to fully understand the law questions involved, it was deemed necessary that the foregoing extended statement of facts should be made. These facts are fully set forth in the record and it is upon those facts, and the law applicable to them, that they press this suit. It is to be remembered, however, that courts are interpreters and not makers of the law; it is not the province of the courts to usurp the functions of the legislature or the General Council, by questioning the wisdom of their authorized acts. If the General Council had the power to enact these ordinances, the discussion is ended, regardless of our private opinion as to their wisdom or merit.

An ordinance passed by a municipality cannot be held invalid upon any other ground than its illegality. It is not within the province of this court to say that a valid ordinance is unwise or impolitic; those questions are to be addressed solely to the General Council.

In *Wells v. Town of Mt. Olivet*, 126 Ky., we said:

"When an ordinance is assailed upon the ground that it is illegal, unfair, unreasonable or oppressive, the person complaining will ordinarily be required to point out specifically in what respects the ordinance is unreasonable, unequal or oppressive as applied to the facts of the case relied on by him. \* \* \*

"When the aid of the court is invoked to declare a municipal ordinance void, it must clearly appear that it is inherently violative of the law or some of the well-settled principles that are generally recognized as limitations upon the power of municipalities in the enactment of ordinances, or, if the ordinance is not inherently defective as coming within these inhibitions, then the person attacking it must affirmatively show that as applied to him it is unreasonable, unfair or oppressive. *State Consolidated Traction Co. v. Elizabeth*, 32 L. R. A., 170."

Cooley on "Constitutional Limitations," says:

"The courts must assume, that legislative discretion has been properly exercised. If evidence was required it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act it would seem that the passage of the act itself might be held equivalent to such finding." (7th Ed., p. 257).

In *Kittinger v. Buffalo Traction Co.*, 160 N. Y., 377, the Supreme Court of New York speaking through Chief Justice Parker, said:

"And the same presumption that legislative action has been devised and adopted on adequate information and not under the influence of corrupt motives will be applied to the discretionary action of municipal bodies and of a state legislature, and will preclude in the one case as in the other all collateral attacks."

In *Slade v. Lexington*, 121 S. W., 621, this court, speaking through Judge Hobson, said:

"The authorities are practically agreed that an ordinance defining and granting a franchise is the exercise of a legislative function, and that a court of equity will not enjoin a council in the exercise of its legislative functions. There is sound reason for this; for, if the legislative authority of a city may be enjoined from exercising its judgment in all cases in governmental matters where it is insisted by the complainant that the council is about to do something which it has no authority to do, great confusion in the government of cities would en-

sue, and the distinction between legislative and executive functions would amount to little. The Constitution forbids the judicial department from interfering with the Legislature in its functions. The purpose of the separation of the government into three departments was to preserve the independence of each. If an ordinance defining and granting a franchise may be enjoined, then all legislative matters before the council may be controlled by injunction, such as the question of high or low license, and fixing of boundaries of the city, the erection of buildings within the city, and the like, wherever it is conceived that the council is about to pass some ordinance without authority to do so. If such were the practice, the dignity of the council would be entirely destroyed, and the office would be so burdensome that many persons would shrink from assuming it."

Having in view this well established doctrine as to the province of the courts, we will proceed to examine the legal questions presented by this record; and in doing so, we will follow the line of argument formulated by counsel for plaintiffs, in six propositions, wherein they contest as follows:

1. The ordinances are in violation of section 2777 of the Kentucky Statutes, which provides that no ordinance shall be altered or amended in any way except by repealing it:

2. The ordinance creating the gas franchise is in direct violation of section 3037D of the Kentucky Statutes:

3. The first ordinance is illegal in that it undertakes to disable the city from exercising its right vested in it by the General Assembly to purchase the plant of the Louisville Gas Company at the expiration of its charter:

4. The second ordinance is illegal for the reason that in it the city of Louisville undertakes to commit the General Council of the city of Louisville, in advance, to enact a certain ordinance creating certain maximum rates for electricity and restraining its power to reduce such rates:

5. The purchase of the gas franchise under the first ordinance by "H. M. Byllesby & Company," which would inevitably be the purchaser thereof, and the carrying into effect of the contract between "H. M. Byllesby & Company" and the city of Louisville," would in effect and re-

ality give to "H. M. Byllesby & Company" a monopoly of manufacturing and distributing electricity and gas and of distributing natural gas in the city of Louisville, contrary to the Constitution, laws, and well-settled public policy of the Commonwealth of Kentucky; and

6. The ordinances violate section 164 of the Constitution in that they do not contemplate the granting of a franchise after due advertisement, the public receiving of bids, and the awarding of such franchise to the highest and best bidder.

1. Section 2777 of the Kentucky Statutes, is a part of the charter of cities of the first class, and reads as follows:

"No ordinance shall be passed until it shall have been read in full in each board and free discussion allowed thereon, and no ordinance shall pass both boards on the same day. No ordinance shall embrace more than one subject, and that shall be expressed in its title. No ordinance shall be altered or amended in any way except by repealing it."

Counsel for plaintiffs rested the oral argument chiefly upon the first sentence of said section, which provides that no ordinance shall be passed until a free discussion has been allowed thereon, and that no such discussion was offered to the members of the General Council in this case, since the ordinances were passed by the Board of Councilmen the same day on which they were introduced. But certainly it is not for this court to say how much discussion the General Council shall allow upon any particular ordinance, or that parliamentary rules of procedure shall be applied otherwise than under the ordinary rules of such procedure.

In *State v. Superior Court of Milwaukee County*, 105 Wis., 651, the court said:

"It is enough to say that a court of equity has no place in the chamber of the common council to supervise or superintend the proceedings of that body while engaged in the exercise of legislative or discretionary functions."

If the record shows that the law governing the enactment of ordinances was complied with, it is not for the courts to say that the law has not been complied with. In the case at bar all the technical requirements of the procedure in the passage of ordinances were complied with. They passed the lower board on March 25th, and the upper board on March 27th, after amendment, in

two respects. The amendments necessitated a reconsideration by the lower board, which passed the ordinances on the 28th. The General Council had the exclusive right to say whether an hour or two hours, was sufficient time for a free discussion of the ordinance. In the case at bar the vote of the Board of Aldermen was unanimous, while the vote in the Board of Councilmen contained only two votes against the ordinances. The minutes further show that the two objecting members of the Councilmen addressed that board at length, setting forth their views in opposition.

Furthermore, it is a well known fact that questions of legislation are not only frequently, but generally are discussed in advance and changed so as to meet new views suggested by the discussion, and bills in conformity therewith are drawn by a committee before they are introduced into the legislative body; and in this way members obtain all the knowledge of the proposed legislation they could otherwise obtain, and are prepared to vote without further discussion.

Plaintiffs further contend that under the last provision of section 2777, section six of the Kentucky Electric Company's franchise, which prohibits it from selling out to a competitor, should have been formally repealed in order to eliminate it, and that it could not have been eliminated in any other way than by a surrender of the franchise of the Kentucky Electric Company, by a repealing of the ordinance by the city, and by the enactment of a new franchise ordinance in which section six would not have appeared. We have been cited to no authority in support of the construction of the statute here insisted upon; and it being conceded, as it must be, under the authority of the decision of this court in *Louisville Home Telephone Co. v. City of Louisville*, 130 Ky., 626, that the city and the Kentucky Electric Company could, by agreement, eliminate the provision in question, we see no reason why they should not agree in the manner here adopted. The purpose of the statute was to prevent loose legislation of doubtful meaning, rather than to control parties in the exercise of their individual rights under existing ordinances.

Evidently section 2777 was not intended to affect the private rights of parties obtained under ordinances, since the right to change or annul those privileges by agreement is affirmatively fixed by the decision in the *Louisville Home Telephone Company* case.

2. It is further insisted that the ordinance creating the gas franchise is in direct violation of section 3037D, of the Kentucky Statutes. That section is a part of the Act of 1904 amending the charter of cities of the first class, and provides, among other things, for the sale of a new franchise upon the expiration of a former franchise, and that the new franchise shall be similar to the original franchise. This objection is based upon the fact that the circuit court has determined that the franchise of the Kentucky Heating Company has expired; that said company now has no franchise, and that the statute which requires the city to sell "a similar franchise" is not satisfied by a sale of a natural gas franchise. The franchise of the Kentucky Heating Company was for furnishing "natural gas for fuel and heating purposes," while the franchise offered under the new ordinance is for the sale of "natural gas, manufactured gas and mixed gas, for heating and lighting and other purposes." There is a complete answer to this contention. In the first place, the statute requiring a sale of a similar new franchise was evidently passed for the benefit of the owner of the expiring franchise, and he only can complain if the city offers a different franchise. It will not be contended that the city may not offer as many different franchises as it pleases, and it may yet offer a franchise in the exact terms of the original franchise, held by the Kentucky Heating Company. If the Kentucky Heating Company should choose to require the city to carry out the judgment of the chancellor, by offering a franchise similar to its expired franchise, the city will have to do so, and its offer of the present franchise for the sale of natural and artificial gas will not stand in the way. The franchise offered in the proposed ordinance, is in no sense exclusive; on the contrary, section 23 of the proposed franchise, above quoted, expressly provides that nothing in said ordinance shall be construed as exclusive, or as preventing the city from granting a like franchise or privilege to any other person, firm or corporation; and, of course, if it can grant a like franchise, it can certainly grant a different franchise.

3. By section 19 of the present charter of the Louisville Gas Company the city has the right to buy the plant of the Gas Company upon the expiration of its charter on January 1, 1919. The same provision is found in section 3 of the Act of March 20, 1902, which

is now contained in subsection 3 of section 2783A of the Kentucky Statutes as a part of the charter of cities of the first class.

As above stated, section 3037D of the Kentucky Statutes, being a part of the Act of March 22, 1904, and embraced in the charter of cities of the first class, provides for the sale of a new franchise upon the expiration of a former franchise, and for a purchase of public utility plants by cities of the first class. Conceding that these statutory provisions have not divested the city of Louisville of its power to purchase the plant of the Louisville Gas Company upon the expiration of its original charter, nevertheless the city of Louisville had the right, under the authority of *Louisville Home Telephone Co. v. The City of Louisville*, *supra*, to change the contract as it did, by postponing the right to buy the plant until the expiration of the present charter. If a city has the right to annul a contract provision in a franchise, as was decided in the *Louisville Home Telephone Company* case, it certainly has the less important right of postponing that privilege until the expiration of the new charter. The authorities cited by plaintiffs upon this point, are to the effect that a municipality cannot, in the absence of express legislative authority, make contracts or pass by-laws which would cede away, control or embarrass its legislative or governmental powers, or which would disable it from performing its public duties. 1 Dillon's Munic. Corp., Sec. 245. That proposition is surely sound. But that class of cases is not controlling here, since the right to buy the gas plant is a contract right which may be dealt with like any other property right. No legislative or governmental power is abridged by the proposed postponement of the right to buy the plant. Moreover, section 21 of the new franchise gives the city the right to buy not only the existing plant, but all the new plant that may be installed under the new franchise. If the time had now arrived for the city to exercise its option to buy, can it be doubted that it would have the right and the power to bargain with the Gas Company for an extension of this option? We think not. Really, plaintiffs' contention amounts to this: the city can make no contract which looks to the future for its fulfillment; and, of course, that means the city can make no executory contract.

But in *Slade v. City of Lexington*, 141 Ky., 214, it was held that a contract by a city for the renewal of a waterworks contract at the end of twenty-five years, was

valid and enforceable. Being a mere contract right and not within the rule applicable to governmental powers, we see no reason why the city may not deal with it, as with any other property right.

4. Is the contract ordinance illegal because the city therein undertakes to commit the General Council in advance, to enact a certain ordinance creating certain maximum rates for electricity, and restricting its powers to reduce such rates?

Plaintiffs insist that it is, and rely upon the line of cases last above referred to. It must be admitted that if the city had the power to pass the ordinance creating the new franchise, without this ancillary contract, its failure to pass the contract ordinance now objected to, would not invalidate the franchise ordinance. Neither would it invalidate the contract ordinance in which it is embraced. The General Council would have the right to pass the ordinance, to repeal it if passed, and to provide other reasonable rates; and we fail to see how the mere fact that it now proposes in advance to prescribe maximum rates to which Byllesby & Company agree to abide, invalidates the ordinance.

Plaintiffs rely upon a line of cases which hold that a city council has no power to embarrass itself in the future exercise of its legislative discretion, by agreeing in advance to fix a scale of maximum rates for electricity. That, however, is a-begging of the question, since the ordinance does not bind the city as to the future exercise of its legislative discretion in this respect; it merely prescribes maximum rates for the present, which Byllesby & Company agrees to accept as reasonable. As before stated, it does not prevent the city from making other reasonable rates. This is easily seen from an examination of the ordinance.

By section B of the Contract Ordinance Byllesby & Company agrees to abide by the terms of an ordinance fixing the maximum price for electricity as therein set out, whenever the city passes such an ordinance. At the present the franchise of the Louisville Lighting Company contains no restriction upon rates; it can charge what it pleases, or can get. The franchise of the Kentucky Electric Company fixes a maximum of 9 cents for light and 4 cents for power. Under this state of affairs, the city may pass an ordinance fixing the maximum rates of both companies, provided they be reasonable and produce a fair return upon the investment; and under the



proposed contract both companies agree that they will not contest the prescribed rates, if they be adopted by the city.

But in the third section of clause D of the contract the ordinance further expressly provides:

"The city of Louisville reserves the right to make reasonable regulations of rates for the use of electricity, and for lamps for both private consumers and municipal purposes, and the capital stock or bond issue of said company shall not be considered in fixing said rates."

It is plain therefore that there is no restriction upon the city in fixing rates for electricity, except that imposed by law—that they be reasonable. The proposed rates are an advantage to consumers of electricity in that the contract binds Byllesby & Company to their reasonableness; it does not, however, prohibit the city from making lower rates.

This objection is based upon a misconception of the effect of the contract ordinance, and is without substance.

5. Would the purchase of the proposed franchise by "H. M. Byllesby & Company" confer upon that corporation a monopoly of manufacturing and selling electricity and gas and of distributing natural gas in Louisville in violation of the statute, or the public policy of the State?

The public policy of a State is expressed in its Constitution and statutes, and in its common law as found in the opinions of its court of last resort. If the Constitution or statutes speak upon a subject, the public policy of the State is necessarily fixed to that extent. And when the legislature speaks and the courts construe that declaration, we certainly have a conclusive rule as the public policy of the State upon the subject thus treated. We cannot agree that the act of a municipality may have the sanction of the law and yet be against public policy. When the legislature has spoken, we cannot look to general expressions in opinions of this court as laying down a rule of public policy in opposition to that contained in the statute. We have various statutory provisions relating to monopolies. Under section 555 of the Kentucky Statutes two or more corporations of this State, may consolidate into a single corporation; while section 769 confines the acquisition by one railroad of the franchise of another, to a non-competing line. Section 201 of the Constitution prohibits the consolidation of competing or parallel railroads or like companies.

Section 198 of the Constitution reaches the subject in hand, and provides as follows:

"It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."

In 1890, prior to the adoption of the present Constitution, the legislature dealt with the subject by an act which became sections 3915 to 3941, inclusive, of the Kentucky Statutes, against "Pools, Trusts and Conspiracies." That act forbade the formation of trusts or monopolies without regard to whether they raised or depreciated the price of an article when compared with its real value.

In 1906, however, the legislature amended the statute so as to authorize farmers to combine for the purpose of obtaining higher prices for their products. This statute is known as the "Pooling Statute," and is section 3941a of the Kentucky Statutes. But in the recent cases of *Commonwealth v. International Harvester Co.*, 131 Ky., 556, *International Harvester Co. v. Commonwealth*, 137 Ky., 674, and *International Harvester Co. v. Commonwealth* 144 Ky., 403, it was held that under the law of Kentucky as it exists today there is no prohibition against the formation of trusts or monopolies, but that they are liable to a fine if they sell their products above or below their real value, such real value to be fixed by a jury. The law has so stood since 1906, without change by the legislature, and must be accepted as the public policy of the State upon the subject. When properly construed and applied, we do not find anything in *Stites v. Norton*, 125 Ky., 672, or in *Merchants Ice & Cold Storage Co. v. Rohrman*, 138 Ky., 530, and kindred cases relied upon by plaintiffs that can take this case out of the operation of the rule laid down by the act of 1906. If the city had the authority to pass these ordinances, there is nothing in the public policy of the State that would invalidate them.

6. Finally, we pass to a consideration of the most difficult question presented by this record: Do the ordinances violate section 164 of the Constitution?

Said section reads as follows:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any

franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

Plaintiffs contend that since the ordinances provide for an advertisement of the sale of the franchise of not less than two weeks, in two specified Louisville daily newspapers, one printed in English and the other in German, there is no "due advertisement" such as is required by section 164 *supra*. It is contended that the advertising provision is merely a perfunctory compliance with the constitutional requirement, and does not comply with the spirit of the Constitution. There is no statutory or constitutional provision defining what constitutes "due advertisement," and we are not advised by the plaintiffs as to what would be a compliance with this provision of the Constitution. In the absence of some statutory provision upon the subject, we cannot question the good faith of the General Council in fixing the length of this advertisement at not less than two weeks, in two different newspapers. Lands of debtors are generally sold at judicial sales after an advertisement of ten days; and, while persons might well differ as to what constitutes a "due advertisement" either as to the character of the advertisement, or its comprehensiveness and extent, we are not authorized to say that the legislative body of the city has violated the broad discretion here given it. If the framers of the Constitution had intended to circumscribe the power of the General Council in this respect, it would have done so. We have been referred to no authority upon the question, beyond the language of the section as above quoted.

It is further contended, under this heading, that the ordinances are so drawn that "H. M. Byllesby & Company" must, of necessity, be the only bidder at the sale of the franchise, and that therefore it cannot be sold to the highest and best bidder, when there can be only one bidder, and no competition. In other words, this objection is based upon the idea that where the franchise is to be sold in such a way as to give an undue advantage to one person over another, there is no competitive bidding upon equal terms, as is contemplated by section 164;

and that the ordinance is void for that reason. This contention is based upon the doctrine laid down by this court in *Fineran v. Central Bitulithic Paving Co.*, 116 Ky., 495. In that case a street in Newport was constructed under an ordinance which required contracts for construction of streets to be let to the lowest and best bidder, and the ordinance provided that the street should be made of "bituminous macadam," a patented composition in the exclusive control of the Central Bitulithic Paving Co. In view of this exclusive ownership it was contended, and this court held, that there could not be a "lowest bidder" within the meaning of the charter; that there could, in reality, be but one bidder, and pointed out the fact that the vice of the ordinance consisted in its requiring the street to be improved with "bituminous macadam," without placing it in competition with other like or equally as good material for such purposes. The *Fineran* case cited with approval the leading case of *Fishburn v. Chicago*, 171 Ill., 338, 39 L. R. A., 483, 63 Am. St. Rep., 236, where a Chicago ordinance required a street to be paved with asphaltum to be obtained from "Pitch Lake" in the Island of Trinidad. "Pitch Lake" was in the exclusive control of the Barber Asphalt Co., and for that reason the Supreme Court of Illinois held the ordinance was void, because it prohibited competition in bidding. In the course of its opinion the Supreme Court of Illinois said:

"If it be the judgment of the city council that the most suitable and best materials to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality or fitness, and to require that material equal in all respects to it should be so employed. An ordinance making it indispensable that an article or substance in the control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation."

See, also, *Diamond v. Mankato*, 89 Minn., 48, 61 L. A., 448.

In the Fineran case, *supra*, we adopted the rule as above announced, and it has never been departed from by this court. Plaintiffs insist the principle there announced is conclusive against the validity of the franchise ordinance, because, as they claim, it gives Byllesby & Company a double advantage in the bidding, either one being sufficient to invalidate it. It must be remembered, however, that the rule does not apply unless the advantage by its terms, excludes other bidders.

The first obnoxious privilege is found in that provision of the gas franchise which requires the purchaser of that franchise to bring gas to Louisville from West Virginia, which it is contended violates the rule laid down in the Fineran case, because it requires the purchaser to furnish gas from a particular field which is owned exclusively by "H. M. Byllesby & Company," and that it therefore necessarily shuts out all other bidders. If this were true the case might come within the doctrine laid down in the Fineran case, *supra*, and in Fishburn v. Chicago, *supra*, and in Diamond v. Mankato, *supra*, and the ordinance might be invalid for that reason. The petition, however, is not broad enough to present the question in the shape contended for by plaintiffs. The allegation of the petition upon this subject is as follows:

"The plaintiffs say that in the states of Virginia, West Virginia and Kentucky there are very extensive areas of territory under which there lies natural gas, which said gas is chemically and physically available for transportation and use in the city of Louisville for fuel and for lighting purposes; that the defendant, Byllesby & Company, has, so the plaintiffs are informed, by contract through itself or its agents, an option to purchase or lease certain tracts in West Virginia under which tracts such available natural gas exists."

This language is very far from alleging that Byllesby & Company have a monopoly of the natural gas fields of West Virginia; it merely says that Byllesby & Company has an option "to purchase or lease certain tracts" of land, not all of them—under which available natural gas exists. We must assume, therefore, that any prospective bidder is at liberty to supply gas from West Virginia, provided, of course, he has the capital to do so.

And in this connection, it is also insisted that by reason of Byllesby & Company's ownership of the Louisville Gas Company and the Louisville Lighting Company, it is on a much more favorable footing than any

other bidder could possibly be, since it has its plant and mains already in operation, and that for this reason they have an advantage which would make the bidding unequal, unfair, and violative of section 164 of the Constitution. It must be admitted, however, that Byllesby & Company's ownership of the Louisville Gas Company and of the Louisville Lighting Company is an advantage, if it be an advantage, which goes with the ownership of property, or capital. But it does not necessarily exclude other bidders. It is estimated that it will cost perhaps three million dollars to bring to Louisville an adequate supply of natural gas from West Virginia. Of course, a franchise so expensive could not be bought by a person without capital sufficient to operate the franchise; but it cannot be said that this fact would give an exclusive or an undue advantage to the man with capital sufficient to handle the undertaking. The mere statement of the proposition is a sufficient answer to the criticism.

Furthermore, the fact that a gas and electric franchise is drawn so as to cover only territory already occupied by the pipes or wires of an existing company will not invalidate it.

This precise question was before this court in *Hilliard v. Geo. G. Fetter Lighting & Heating Co.*, 127 Ky., 95. In that case the Fetter Company had, under a license from the Board of Public Works built certain underground conduits through which it sold electricity. This court having decided that the license was void, the Fetter Company procured the city to sell an electric franchise, and the ordinance creating the franchise described the location of the underground conduits to be laid in pursuance of its terms exactly as the Fetter Company's conduits were situated. Furthermore, it also prohibited the Louisville Lighting Company and the Kentucky Electric Company from bidding on the franchise. It necessarily followed that the Fetter Company was the successful bidder; and in *Kentucky Electric Co., v. Barret*, 132, Ky., 717, this court sustained the validity of the ordinance.

See, also, *Johnson v. City of New Orleans*, 105 La. Ann., 149, *Ward v. Seattle*, 23 Wash., 1, 52 L. R. A., 369, and *City of Newport v. Municipal Light Co.*, 147 Ky., 776. Under this ruling, the city may hereafter sell another franchise and prohibit the owners of the present franchise from bidding therefor.

The second invalidating privilege which it is claimed Byllesby & Company has to the disadvantage of other bidders, is the agreement on the part of the city to waive in Byllesby & Company the provisions of section six of the franchise of the Kentucky Electric Co., which prohibits it from selling out to a competitor. This objection, in turn, presents two aspects, under plaintiffs' contention; (a) that the prohibition cannot be waived against the consumer, and (b) that, if waived, it confers an insurmountable advantage upon Byllesby & Company, and renders the sale void under the doctrine of the Fineran Case, *supra*.

Of these in their order:

(a) Did the City Council have the power to waive section six of the charter of the Kentucky Electric Company, which prohibited it from selling out to the Louisville Lighting Company, or any other competitor? If this were a case of first impression in this jurisdiction, we might be inclined to give great weight to this contention. The question, however, was put at rest, so far as this court is concerned, by the decision in *Louisville Home Telephone Co. v. City of Louisville*, 130 Ky., 626. In that case the Home Telephone Company's franchise required it to pay annually to the city the sum of one dollar for every telephone or instrument in excess of 6,000. By agreement between the Telephone Company and the city of Louisville, a new franchise was offered for sale from which the provision above referred to was eliminated, and the telephone rates were materially increased. It was contended that the city and the Telephone Company could not, even by agreement, waive a contract in the franchise which had been made for the benefit of the citizens. This court, however, overruled that contention, and held that it was competent for the Telephone Company and the city to agree to the enactment of an ordinance relieving the Telephone Company of the obligation in its original franchise. This view of that decision was emphasized by the dissenting opinion, which conceded the right of the parties, by agreement, to make the change in the original contract, the dissent being rested upon the ground that it could not do so in the absence of a valuable consideration therefor. As there is ample consideration for the waiver in the case at bar, it would seem that the proposal to abrogate section six under the new franchise is supported by the opinion of the court, as well as by the dissenting opinion, in

Louisville Home Telephone Co. v. City of Louisville, *supra*. We cannot accept plaintiff's view of the law governing this point without departing from the decision in the Home Telephone Case, *supra*; and as that case was maturely considered, we see no sufficient reason why we should not follow it.

In McQuillin on Municipal Corporations, Vol. 3, Sec. 1272, the rule as to a city's power to modify its contracts is stated as follows:

"By consent a municipality may modify a contract. Obviously, the municipality cannot, without the consent of the other party to the contract, modify it. The power to modify a contract on behalf of a municipality generally is vested in the officer or body authorized to make the contract. Unauthorized modifications of contracts by officers without authority will not bind the city. Generally, the common council has power, with the consent of the other party, to modify a municipal contract previously entered into, so as to bind the city. Evidence of a modification need not consist of express acts. The consent of the corporation to modify a contract may be inferred or implied from acts on its part relating to the performance of a contract after it formed the conclusion."

In *Arnold v. Pawtucket*, 21 R. I., 15, the city had made a contract to furnish water to a certain district for ten years; and prior to the expiration of the ten years, it made a new contract in place of the old one. The question was, could the city make the new contract and abrogate the old one? The court said:

"The point is taken that as the city in May, 1890, exercised the power conferred by the act of incorporation, by entering into a contract with the district to furnish water to the district for ten years from that date, which term will not expire until May, 1900, it thereby exhausted the power conferred upon it until the ten years during which the contract is to run have terminated. There is, however, no limitation in the act of the power to contract; and, in the absence of such limitation, we see no reason, though such powers are usually strictly construed, and though the contracting parties are corporations, why they may not modify an existing contract, or substitute a new one in the place of it, precisely in the same manner as natural persons, provided only that such modification or new contract be reasonable and proper."



In *Cumberland Telephone & Telegraph Company v. City of Hickman*, 129 Ky., 229, the city sold a telephone franchise conditioned that work upon installing the telephones should be begun within six months and finished within a year. The company was about to forfeit its franchise for failure to perform the conditions, whereupon the City Council extended the time, upon the condition that the maximum charges to subscribers should be less than those fixed in the original franchise. It was contended that this agreement amounted to the granting of a franchise without a sale, and further, that the city had no power to change the contract.

Upon this last point the court said:

"We think it was competent for the city to waive the forfeiture of the franchise because the work had not been begun within six months, in consideration of a reduction of the rates by the owner of the franchise. There was a sufficient consideration moving to the city to support its waiver of the forfeiture; likewise a sufficient consideration moving to the grantee of the franchise to support his agreement to charge patrons within the city, and for whose benefit and welfare the contract had been entered into, a less rate than was originally agreed upon. In doing this, the city granted no new or different right in the use of its streets nor did it abate any of the original consideration. On the contrary, it gave only what it has originally agreed to grant, and got in exchange a better consideration what it had given up was a right to claim a forfeiture—the giving up of which is not the granting of a franchise."

In the late case of *the City of Newport v. The Municipal Light Co.*, 147 Ky., 776, the appellee had, in 1905, acquired a franchise to supply artificial gas for a period of twenty years. In 1910 the city sold a franchise for the exclusive supplying of natural gas, and the new franchise provided that the natural gas might be furnished through the mains then used for the distribution of artificial gas, provided arrangement therefor be made with the owner of the mains, and that such new use should not operate as a forfeiture of the artificial gas franchise. In a suit by the City of Newport to forfeit the franchise for non-user this court overruled the city's contention and sustained the contract. The applicability of the decision to the question before us lies in the fact that the artificial gas company was in a much better position to bid than any other competitor, since it already had its

pipes laid in the streets, and in the further fact that it upheld the right of the purchaser of the franchise to acquire the pipes of the old company.

We conclude, therefore, from these ample authorities that the city had the right to waive the prohibition contained in section six of the Kentucky Electric Company's charter.

(b) It will be remembered the contract ordinance provides that the agreement therein to consent to the purchase of the Kentucky Electric Company by H. M. Byllesby & Company shall not be effective unless that company, or some corporation controlled by it, shall become the purchaser of the natural gas franchise.

Conceding for the sake of the argument that the city had the right to waive the prohibition in section six of the charter of the Kentucky Electric Company in favor of Byllesby & Company, it is nevertheless contended that said waiver rendered the ordinance invalid under the Fineran Case, because it was not waived to every bidder alike.

At first impression the argument seems forceful, but upon a closer examination it would appear to be without merit. It might well be conceded that if the effect of this provision of the ordinance was to give "H. M. Byllesby & Company" some exclusive privilege or advantage over other bidders for the franchise, the case would come within the doctrine laid down in the Fineran Case above quoted, and the ordinance would be invalid.

Counsel for plaintiffs liken this case to a case where a man offers his horse for sale at public auction, upon the condition that if Jones buys the horse he will give Jones a farm worth a thousand dollars; but that if Smith buys the horse, he is to get nothing beyond what he buys; and it is insisted that in such a case Jones would, in reality, be the only bidder. But the misleading feature of the illustration consists in the radical difference between the legal relations existing between Jones and Smith and the relations existing between the parties in the case at bar. In the case put by counsel, Smith and Jones stood upon equal terms as bidders before the proposition was made to give Jones the farm, and it was the giving of the farm that put them upon an unequal footing. But in the case at bar Byllesby is not upon an equal footing with other purchasers under the present situation, and the abrogation of prohibitive section six in the franchise of the Kentucky Electric Com-

pany will have the effect only of putting him upon an equal footing with other bidders. The reason is plain when we analyze the situation. As it now stands, any person except Byllesby & Company may lawfully purchase the Kentucky Electric Company, and any person, other than Byllesby & Company, can buy both the natural gas franchise to be sold, and the Kentucky Electric Company. But Byllesby & Company cannot do that, since, being the owner of the Louisville Lighting Company, which is a competitor of the Kentucky Electric Company, it is prohibited from buying the latter company by section six of the latter company's charter. In other words, this section puts a prohibition upon Byllesby & Company which other bidders are not required to carry. Other bidders can buy the natural gas franchise and can also buy the Kentucky Electric Company, and neither the city nor any other interested person can prevent them from so doing. They would therefore have the advantage over Byllesby & Company when it came to bid for the natural gas franchise. In order, therefore, to put all parties upon an equal footing, the ordinance provides that in case Byllesby & Company should buy the natural gas franchise, it should, like other bidders, have the right to buy the Kentucky Electric Company; and the provision in the contract ordinance above referred to, which provides that the prohibition of section six should be waived only in favor of Byllesby & Company, instead of being an advantage to it in the bidding, over other bidders, merely puts it upon an equal footing with other bidders. And, this being true, it does not, in any sense, do violence to the doctrine laid down in the Fineran Case, and in the other cases above referred to. It does not make Byllesby & Company the exclusive bidder, like the owner of a patented article, or the owner of "Pitch Lake" asphalt.

It would be no violation of section six, for the owner of the gas franchise to acquire the Kentucky Electric Company's property and franchises, or for the Kentucky Electric Company to acquire the plant and franchises of a gas company; but because Byllesby & Company happens to own the Louisville Lighting Company said section prohibits Byllesby & Company from becoming the owner of the Kentucky Electric Company—thus placing Byllesby & Company under a disability which is attached to no other bidder for the gas franchise. The removal

of the disability from Byllesby & Co., gives it no exclusiveness in the bidding.

But if, in order to put every possible bidder upon an equal footing, the ordinance had provided that the purchaser of the gas franchise might acquire both electric companies without forfeiting the franchise of the Kentucky Electric Company, the same condition of inequality would have existed, because, as Byllesby & Company already own the Louisville Lighting Company, it would have been in a position to buy the Kentucky Electric Company, whereas any other bidder would have been compelled to buy both electric companies, in order to accomplish the same purpose. And, the city having the right to waive the prohibition of section six, there could be no objection to the form of the ordinance, since the bidding would be open to all upon equal terms, although in reality, the same apparent inequality would exist between them.

The provision of the contract ordinance for the dismissal of the injunction suit prohibiting the Kentucky Electric Company from selling out to the Louisville Lighting Company is but a part of the details necessary to remove the prohibition above referred to, and need not be further considered.

We have thus carefully and fully examined every ground relied upon by the plaintiffs in support of the order of injunction, and have reached the conclusion that the ruling of the chancellor cannot be sustained.

The injunction is dissolved.

This opinion is concurred in by Chief Justice Hobson, and Judges Settle, Lassing and Turner. Judge Nunn absent; Judge Carroll not sitting.

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### **Gabbard v. Commonwealth.**

(Decided May 29 1913.)

#### **Appeal from Breathit Circuit Court.**

1. Homicide—Evidence—Self-Defense—Uncommunicated Threats.—Evidence of uncommunicated threats by deceased against accused is admissible to show the state of mind of the deceased, at the time of homicide, and also to show who was the aggressor.
2. Homicide—Appeal—Harmless Error.—Where it appears that evidence of uncommunicated threats would throw light upon the question of the state of mind of the deceased, or who was the

aggressor, at the time of the homicide, it is error to exclude such evidence. But, where such evidence is cumulative and the record shows the accused to be the aggressor and that he has had a fair trial, no reversal should be ordered because of the exclusion of such evidence.

COPE & COPE and A. H. PATTON for appellant.

JAMES GARNETT, Attorney General, OVERTON S. HOGAN, Assistant Attorney General for appellee.

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

The grand jury of Breathitt County indicted Pierce Gabbard, charging him with the wilful murder of Ike Gabbard. He was tried, found guilty, and his punishment fixed at confinement in the penitentiary for life. From the judgment of conviction he appeals and complains that the verdict is against the weight of the evidence and that the court erred in the admission of incompetent evidence, in the rejection of competent evidence and in his instructions to the jury.

The deceased lived, and ran a country store, about eight miles from Jackson, the county seat of Breathitt County, and was a neighbor and double first cousin of the accused. On September 23, 1912, both the accused and deceased had been drinking and were, to some extent, under the influence of liquor. Pierce Gabbard, on that day, came to the store ostensibly to pay an account he owed decedent. While he was in front of the store and deceased was at his dwelling nearby, words passed between them and finally there was an exchange of some three or four shots resulting, according to the testimony of the Commonwealth, in the wounding of appellant. Deceased was not injured in that difficulty. After this shooting, appellant disappeared but returned within an hour bearing a double barreled shot gun and a Winchester repeating rifle and, finding the deceased and his wife seated at the front door of their dwelling, opened fire upon them. Ike Gabbard and his wife were both struck by these shots, with fatal results in the case of the husband. They retreated into and through the house, and when Ike Gabbard had reached a point about fifty yards from his house he fell to the ground dead. Appellant undertakes to explain his return with the guns in this way. He was a constable and had arranged with some persons to aid him in the arrest of a deserter from the United States army, and these guns were for those who were to assist

him in this duty, and the road passing the residence of deceased was the only way he could proceed in the effort to arrest this deserter.

The Commonwealth made out a strong case of inexcusable homicide. While in the motion and grounds for a new trial it was urged that the verdict was not supported by the evidence, that point is not seriously pressed here, but counsel insist that the judgment should be reversed because the trial court erred in excluding competent evidence. This consisted of threats alleged to have been made by the deceased against appellant on the day of the homicide, and only a few hours previous thereto. It is held in *Commonwealth v. Thomas*, 31 Rep., 899, and *Wheeler v. Commonwealth*, 120 Ky., 697, that evidence of this character is competent for the purpose of showing the state of mind of the one making them, and also for the purpose of determining who was the aggressor. In all cases, where it has reasonably appeared that the admission of such evidence would throw light upon either of these questions, where they were involved, it has been held error on the part of the trial court to exclude it. If the killing had occurred during the first encounter, it would have been error to exclude this evidence of previous threats made by the deceased against appellant, but, according to the evidence offered by appellant, no injury resulted from the first encounter. From all the evidence, it is apparent that it only resulted in arousing appellant's anger, and, if the evidence for the Commonwealth is to be believed, he left the scene of the difficulty declaring that he was going after his gun and kill his cousin. He undoubtedly continued in this frame of mind, for on his road home he passed several persons to whom he related the story of the difficulty with his cousin, with more or less detail, and to each he declared, in substance, his purpose to carry out the threat made in the presence of deceased's wife when he left their home. He went as rapidly as he could to his own home, a mile or a mile and a quarter distant, got his gun, and started back toward the home of deceased. On his way he stopped at the house of a relative, who was not at home at the time, went in, got a Winchester rifle, and proceeded back to the scene of the first difficulty. It is in evidence that he was followed by two of his children and was requested by some friends, whom he passed, to return to his home and not have any difficulty. While he stoutly denies any purpose to have further trouble with the deceased, the conclusion

is irresistible, from the overwhelming weight of the evidence, that appellant returned to the home of deceased for the purpose of avenging a wrong which he conceived deceased had done him, by shooting him or shooting at him in the first encounter. Appellant had declared his purpose to kill deceased, and immediately that he reached the later's home, he opened fire upon him while he was standing in the door of his own home. His aim was true, and the effect of the shots deadly. Deceased and his wife retreated into their house and out of the rear portion thereof, the wife going in one direction, the deceased in another. Appellant followed them into the house, searched for them, and when he failed to find them there, fired his gun two or three times while in the house.

We are unable to see, under the circumstances as developed by this evidence, what light evidence of previous threats could have shed upon the question of who was the aggressor, or the frame of mind in which the deceased was at the time the last difficulty commenced. Still, this evidence was competent, but, while competent, it was merely cumulative; and when this is the case, no reversal should be ordered because of its exclusion, where it appears, from a consideration of the entire record, the accused had a fair trial. *Hargis v. Commonwealth*, 135 Ky., 578. The evidence as to the first difficulty, which was given to the jury in detail, showed the frame of mind the deceased was in, and the conduct of each party left no room for doubt as to who was the aggressor in the difficulty, resulting in the killing for which appellant was tried. Under the circumstances, it was not prejudicial for the trial court to exclude this evidence of threats from consideration by the jury.

The evidence for the Commonwealth was to the effect that appellant was shot in the arm during the first encounter, and that this angered him and aroused in him a murderous spirit, causing him then and there to declare his purpose to kill deceased. With this end in view, he went to his home, armed himself, and, despite the pleadings and protests of his relatives and friends, returned to the scene of the difficulty and carried his threat into execution. It was cold-blooded, premeditated murder, and it is difficult to see how a jury, at all mindful of their oaths, could have imposed a milder punishment. Few cases have come before us where the evidence so clearly established a murderous purpose, so deliberately planned and so boldly executed.

After a careful consideration of the record, we see no reason for disturbing the judgment. It is, therefore, affirmed.

### **Black v. Commonwealth.**

(Decided May 29, 1913.)

#### **Appeal from Carlisle Circuit Court.**

1. Criminal Law—Confession.—Where, in a prosecution for rape, the prosecuting witness said that the accused came into her room, and a witness testified that he heard the accused say that he went into the room for the purpose of getting his grandmother's money, this was not a confession of guilt, and did not authorize an instruction under section 240 of the criminal code.
2. Criminal Law—Unlawfully Detaining a Woman Against Her Will—Instruction.—Where the evidence for the Commonwealth showed that the accused entered the room of the prosecuting witness and laid his hands upon her and took hold of her against her will and consent, it was not improper, after telling the jury that if the accused unlawfully and willfully took and detained the prosecuting witness against her will and consent with the intent to have carnal knowledge of her, they should find him guilty to instruct the jury that if the accused laid his hands upon or took hold of the prosecuting witness, against her will and consent, and with the intent to have carnal knowledge of her, this would be a taking and detaining in the meaning of the instruction, although it is not essential that this definition of unlawful detaining should be given.
3. Criminal Law—Misconduct of Juror—How Made Available on Motion for New Trial.—When a new trial is asked on the ground that a juror has been guilty of misconduct, the party seeking a new trial on this ground should do so at the earliest moment after he has received information of the misconduct complained of, and should file his affidavit stating when he received this information. If the party seeking a new trial on this ground fails to do this, he will be deemed to have waived his right to a new trial on this ground after there has been a verdict against him.
4. Criminal Law—Weight of Evidence for the Jury.—In criminal cases we will not interfere with the finding of the jury on the ground that the verdict is not sustained by sufficient evidence, unless it affirmatively appears that the verdict is so contrary to the evidence as to make it appear that it was the result of passion or prejudice.
5. Criminal Law—Form of Judgment Where Accused is Under Twenty-one.—Where a minor defendant is convicted of a felony, the court should in its judgment direct his confinement in the house of reform until he attains his majority, and if his term of



punishment be not then ended, that he be transferred to the penitentiary.

JOHN E. KANE, B. C. SEAY for appellant.

JAMES GARNETT, Attorney General, D. O. MYATT, Law Clerk for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The appellant, under an indictment charging him with unlawfully detaining a woman against her will, was tried and convicted, and on this appeal he asks a reversal of the judgment against him.

It appears from the record that in September, 1912, the prosecuting witness, Miss Beulah Watson, was teaching school and boarding at the house of John Black, a brother of appellant. She testifies that appellant came to the house while they were at supper and was then introduced to her and that when she retired to her room for the night about nine o'clock she left appellant sitting on the porch with his grandmother. That a window in the room she occupied looked out on the porch where she left appellant. She further testifies:

"I went to bed about nine o'clock and pulled the window shades and locked the door, and I went to bed, and I had been to sleep but a short time, about half past nine or nine-forty, somewhere along there; some one had their hand on my arm and one across me, and I jumped up and hallooed and some one said: 'Don't be afraid; it is me,' and I recognized his voice as Siguesman Black's, and I jumped up and grabbed his arm and I run my hand up his arm and felt the hairs on it and he was in his shirt sleeves and his sleeves rolled up to his elbow like I had seen Siguesman Black's at supper, and I jumped up out of bed and began hallooming for John Black to come there, that some one was in my room; and I went through my door out in the hall and he went out at the window while I was going out at the door."

There is also evidence to the effect that the screen on the outside of the window, through which the man entered, was pulled off, and that early on the following morning Miss Watson telephoned to her parents, who came as soon as they could, and she then told them what had happened and who her assailant was.

John Cothes, also a witness for the Commonwealth, said that a day or two after this, he heard the appellant

make the following statement: "I jes heard him talk. he was not talking to me. The boys were teasing him about it and he said he went in there; thought it was his grandmother's room and was trying to get her money."

Testifying in his own behalf, appellant, who is under twenty-one years of age, admitted that he was at the house of John Black at the time testified to by Miss Watson, and that after supper he sat on the front porch talking to his grandmother, but denied that he assaulted or went into the room of Miss Watson. He said that about the time or a few minutes after his grandmother retired for the night, he left the house of his brother and went to the home of George Polivick, who lived in the neighborhood, and after remaining there for a while, in company with Polivick, he went to the house of Louis Polivick, and from there to the town of Bardwell, where he spent the night in a livery stable with Tom Slaughter.

A good many other circumstances throwing some light on the affair were testified to by witnesses in behalf of both the Commonwealth and the appellant, but we have related enough of the evidence to illustrate the grounds relied on for reversal. The first assigned error relates to instruction number one given by the trial court, which is as follows:

"The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, Siguesman Black, in this county and before the finding of this indictment, unlawfully and wilfully took and detained the prosecuting witness, Beulah Watson, against her will and consent, with the intent to have carnal knowledge of her himself, then and in that event the jury will find defendant guilty.

"And the court further instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant laid his hands upon or took hold of said Beulah Watson against her will and consent, and with the intent to have carnal knowledge of her himself, this would be a taking and detaining in the meaning of the instructions."

The criticism of this instruction relates to the last paragraph in which the court defined the acts that would constitute a violation of the statute by appellant. The argument is made that it was error to single out the facts stated in this paragraph of the instruction and advise the jury that their existence constituted guilt. In support of this position we are referred to *Polly v. Common-*

wealth, 16 Ky. Law Rep., 203, in which it was held to be error under the facts of that case to instruct the jury that they should find the defendant guilty if he detained the prosecuting witness by getting in bed with her and by putting his hands and arms about her. The facts of that case, however, are so radically different from the facts in this case that what the court said in criticism of the instruction there given is not at all applicable to the instruction in the record before us. In that case the accused admitted that by inadvertance or mistake he did get in the same bed with the prosecuting witness, and thinking that she was his wife, put his hand upon her. Here the appellant denied that he was in the room where the prosecuting witness was. If he did take hold of her and lay his hands upon her, there is no claim that it was done through mistake or inadvertence or thoughtlessness.

If he was guilty of the conduct ascribed to him by the prosecuting witness, he committed an offense under the statute, and whether he was guilty or not depended on the weight the jury might attach to her evidence and other circumstances shown in the case. Section 1158 of the Kentucky Statutes, under which the indictment was found, does not describe in detail the acts that constitute the offense, merely providing that "whoever shall unlawfully take or detain any woman against her will," shall be punished, and we do not think it was improper for the court to advise the jury what constituted an unlawful taking or detaining. Certain it is that in this case the instruction was not prejudicial, because the only direct evidence of an unlawful taking or detention was furnished by the prosecuting witness and the instruction did no more than state the acts of which she testified the appellant was guilty. If her evidence was true, and the jury evidently believed it was, the appellant did take and detain her in the meaning of the statute: *McKey v. Commonwealth*, 145 Ky., 450; *Bowman v. Commonwealth*, 31 Ky. Law Rep., 828; *Gibson v. Commonwealth*, 31 Ky. Law Rep., 945; *Stewart v. Commonwealth*, 141 Ky., 523; *Jones v. Commonwealth*, 28 Ky. Law Rep., 213; *Copenhaver v. Commonwealth*, 31 Ky. Law Rep., 1161.

Another error assigned is the failure of the trial court to instruct the jury on the subject of a confession, in reference to the evidence of John Cothes. The statement Cothes testified he heard appellant make was not a confession, and for this reason alone an instruction on the

subject of a confession would have been manifestly improper.

It is further said that a new trial should be granted on account of the misconduct of W. H. Boswell, one of the jury. The affidavits of three persons were filed in connection with the motion for a new trial, in which each stated that they heard Boswell, about a week before the trial, say that "from what I am told, I think that Siguesman Black should be punished for what he did." Passing the sufficiency of this alleged statement of Boswell to authorize the trial court in setting aside the verdict, the affidavits were not presented in such a way as to make them available for the purpose intended in their introduction. These affidavits were filed in support of one of the grounds relied on for a new trial, but the affiants did not state when they first informed appellant or his counsel of the information they had concerning Boswell, nor do we find in the record any affidavit by appellant or his counsel relating when they were first advised by these affiants what Boswell said.

When a new trial is asked on the ground that a juror has been guilty of misconduct, the person seeking a new trial on this ground should do so at the earliest moment after he has received information of the misconduct complained of, and should file his affidavit stating when he obtained the information. If the party seeking a new trial on this ground fails to do this, he will be deemed to have waived his right to rely on the misconduct as a ground for a new trial after there has been a verdict against him. Upon this point we said in *Drake v. Drake*, 107 Ky., 32:

"It does not appear but that the misconduct of the juror was known to the plaintiffs before the trial closed. If it was, they were bound to make the objection at the time, and not wait till after a verdict against them. Their omission to state that allegation in their motion renders it insufficient.

"A party should not, with knowledge of misconduct on the part of the jury, conceal it from the court, and take the chance of a verdict in his favor, with the expectation of having it set aside if adverse to him."

It is also insisted that the verdict is palpably against the evidence, and for this reason a new trial should be granted. The evidence against appellant is not by any means conclusive, but yet there was sufficient to take the case to the jury and to support its finding. Under the

facts the jury might reasonably have found the defendant not guilty, but evidently they believed that the evidence of Miss Watson in connection with the other incriminating circumstances developed on the trial, were sufficient to show the guilt of the accused, and we do not feel authorized to interfere with their conclusion.

There is seldom a criminal case tried in which there is not sharp conflict in the evidence introduced for the Commonwealth and the accused, and we have adopted the sound rule of not interfering in criminal cases, or indeed civil cases, with the finding of a jury upon disputed questions of fact unless it affirmatively, and we might say, at first blush, appears that their verdict is so contrary to the evidence as to make it appear that it was the result of passion or prejudice.

It seems that appellant was only seventeen years of age, and it was, therefore, adjudged by the court that he be taken to the reform school at Lexington, "there to remain until he arrives at the age of twenty-one, and then to be transferred to the penitentiary and be there confined, the confinement in the reform school and in the penitentiary to be not less than two years or more than seven years." The form of this judgment is objected to, but the objection is not well taken. We had substantially this question before us in *Calico v. Commonwealth*, 145 Ky., 641, and we there said:

"Where a minor defendant is convicted of felony in the circuit court, the court, upon its own motion, should, upon proof that he is a minor and the offense his first, by its judgment direct his confinement in the house of reform until he attains his majority, and if his term of punishment for the felony be not then ended, that he be transferred to the penitentiary until it expires." To the same effect are *Washington v. Commonwealth*, 143 Ky., 602, and *Henson v. Commonwealth*, 148 Ky., 631.

Upon the whole case we see no reason for disturbing the judgment, and it is affirmed.

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### McIntyre v. Commonwealth.

(Decided May 29, 1913.)

Appeal from Nelson Circuit Court.

1. Criminal Law—Successive Offenses—Penalty.—A statute imposing a severer punishment for second or subsequent offenses re-

lates only to the penalty and is not a punishment for former offenses.

2. Criminal Law—Elements of Crime—Penalty.—The punishment inflicted on a person for a crime or offense constitutes no element or ingredient of such crime or offense.
3. Criminal Law—Former Jeopardy—Plea—Elements of.—For a plea of former jeopardy to avail, it must appear that in each prosecution, the accused, the sovereignty whose law has been violated, and the offenses not only as to the act but also as to the crime, are identical.
4. Criminal Law—Former Jeopardy—Successive Offenses.—In the prosecution for an offense where the accused is also charged with being an habitual criminal, a plea of former jeopardy by the accused alleging that he had theretofore been indicted and tried for another and distinct offense coupled with the same charges of former convictions for felony, was properly held insufficient on demurrer, such plea relating solely to the penalty which constitutes no element of the offense with which he was charged.
5. Criminal Law—Judgment—Estoppel—Matters Concluded.—In the prosecution of an offense wherein the accused is charged with being an habitual criminal, the latter charge being descriptive merely of the class of offenders to which the accused belongs and incidental and collateral to the main question or merits of the case, the parties are not concluded by a judgment in a former prosecution for another and distinct offense upon the issue involving the identical charges of former convictions for felony.

O. W. STANLEY, E. N. FULTON and FULTON & MCGINNIS for appellant.

JAMES GARNETT, Attorney General, D. O. MYATT, Assistant Attorney General for appellee.

#### OPINION OF THE COURT BY JUDGE LASSING—Affirming.

Andrew McIntyre was, in 1912, in the Nelson Circuit Court indicted, tried, convicted, and sentenced to serve a life term in the State penitentiary, for the offense of malicious wounding with intent to kill. Coupled with the charge, were allegations in separate counts of prior convictions of three successive felonies, the first in 1905, and the second and third in 1907 and 1910 respectively. Upon the trial, the defendant pleaded not guilty to the first count of the indictment, and to the second, third and fourth, he entered a plea of former jeopardy. In this plea, it is alleged that in 1912 he was acquitted of an accusation of burglary under an indictment, in which the charge was coupled with allegations of the defendant's former conviction of the same three felonies here charged; and that in 1910, he was convicted of the of-

fense of chicken stealing under an indictment, in which the charge was coupled with allegations of the identical former convictions for felony as here charged in the second and third counts of the indictment. The jury in that case rendered the following verdict: "We, the jury find the defendant guilty of chicken stealing, and fix his punishment at confinement in the penitentiary for two years."

The trial court sustained a demurrer to this plea of former jeopardy. Motion and grounds for a new trial having been overruled, the defendant appeals. Several errors are alleged in the motion for new trial, but only one of them is seriously urged as ground for reversal viz: Error of the court in sustaining a demurrer to the plea of former jeopardy.

It is insisted that the issue of former convictions of appellant for felony having been submitted to and determined by a jury in a former proceeding, the action of the court in the case at bar, in submitting the identical issue on the same facts was in violation of his right not to be twice pursued for the same offense. For a plea of former jeopardy to avail, it must appear that, in each prosecution, the accused, the sovereignty whose law has been violated, and the offense not only as to the act but as to the crime, were identical. Here, the accused and the sovereignty were the same; and the charges as to former convictions, together with the proof in their support, were identical. If section 1130, Kentucky Statutes, known as the habitual criminal act, merely imposes a severer penalty for subsequent offenses, the plea of former jeopardy is without avail, unless the punishment constitutes an element of the offense.

That section 1130 relates solely to the punishment of offenses is no longer a disputed question in this or other jurisdictions, where similar statutes prevail. In *Hyser v. Commonwealth*, 116 Ky., 410, this court in commenting on this section said:

"The validity of this statute has been repeatedly upheld by this court upon the ground that it is not in violation of the constitutional provision that no one for the same offense shall be twice put in jeopardy. The increased punishment is not for the former offenses, but the previous convictions merely aggravate the last offense and add to its punishment. The accused is not required to answer to the former charges and defend

against them. Nothing is heard in reference to the former trials save the fact of convictions."

The Washington Supreme Court in *State v. LePitre*, 54 Wash., 166, 18 American & English Annotated cases, 922, having under consideration a similar statute, said:

"The habitual criminal statute is a thing of modern creation, and while there are many rules of law which may seem inconsistent with its purpose and the procedure adopted to compass it, it is nevertheless sound in principle and sustained by reason. Aside from the offender and his victim there is always another party concerned in every crime committed—the State; and it does no violence to any constitutional guaranty for the State to rid itself of depravity when its efforts to reform have failed. The act is not *ex post facto*. It does not deny the right of trial by jury. It does not put the offender twice in jeopardy. It does not inflict a double punishment for the same offense, or inflict a cruel or unusual punishment, or impose a penalty for crimes committed outside the State. It merely provides an increased punishment for the last offense."

It is, therefore, well settled that the act under consideration simply provides an increased severity of punishment for subsequent offenses. *Herndon v. Commonwealth*, 105 Ky., 197, and authorities there cited. This section of the statutes relates solely to punishment and is to be read in connection with every other felonious statute. When so read, three degrees of punishment are provided, and the severity of the penalty to be imposed depends upon the class or grade of the offender with reference to his habits of lawlessness.

Now, does the penalty imposed for a violation of law constitute an element or ingredient of the offense? "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it." 4 Blk. Comm., 5. Substantially this form of definition of a public offense has been adopted by all the text writers on criminal law. Punishment is defined in 12 Cyc., 953, as "pain, suffering, loss, confinement, or other penalty inflicted on a person for a crime or offense by the authority to which the offender is subject; a penalty imposed in the enforcement or application of law." It is apparent from these definitions that the unlawfulness of acts or conduct results from the prohibition, and not from the penalty imposed. The object of the penalty is to deter lawlessness and, when it is im-



posed, to reclaim the offender from his criminal tendencies. Upon the plea of not guilty, the punishment for the offense charged is not in issue. Under the issue thus raised, no evidence affecting the penalty is permitted. True, under the habitual criminal act charges, proof and finding of former convictions are required, but this is an issue apart from and incidental to the question of guilt of the offense charged and is for the guidance of the tribunal appointed to impose the penalty, in the event of conviction. The punishment constituting no element or ingredient of the offense, with which appellant is here charged or that for which he had been theretofore tried, it follows that the identity of the offenses, a necessary element in a valid plea of former jeopardy, is lacking, and the trial court correctly ruled in sustaining a demurrer to said plea.

Nor can the contention of counsel for appellant be sustained upon the theory of prior adjudication of a matter in issue incidental to the main question. Section 1130 provides a punishment for a class. The name of the accused in the indictment is descriptive and affords a means of his identity. The added charges of former convictions for felony are but descriptive of a class of offenders. The one allegation is individual identity; the other is class identity. If his class identity is put in issue, evidence of prior convictions is introduced, not upon the idea that he is in fact guilty of the acts constituting the crime for which he was convicted but upon the mere fact that he has been convicted of a felony. This fact, if true, establishes the class identity of the accused, an issue wholly collateral to the main question or merits of the case. The individual identity of the accused is necessarily an issue in the trial of every criminal case. Had this issue been seriously urged on the trial in the prosecution of appellant for chicken stealing, and again urged here, would the Commonwealth have been permitted to say in the case at bar that that matter had been determined adversely to appellant and that he was estopped to assert to the contrary in any subsequent prosecution in this Commonwealth? If his credibility as a witness had been attacked in the former prosecution, would the Commonwealth have been permitted to insist in the case at bar that he had been adjudged unworthy of belief and to introduce the records in that case to prove that fact? Manifestly the ends of justice will not permit the parties to a judicial proceed-

ing to be precluded by judgment on an issue so collateral to the main question as that of class identity. Such matters are not precluded by the judgment.

Appellant is shown by the record to be of that class of offenders, too depraved and too dangerous to be at large. The punishment he has heretofore received seems to have been insufficient to restrain his vicious propensities. The supreme purpose of the law, which is to prevent crime, would in his case utterly fail without the statute whose severity has been pronounced upon him by a fair and impartial tribunal.

Finding no error in the record prejudicial to appellant, the judgment is affirmed.

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### **Mann Brothers v. City of Henderson.**

(Decided May 29, 1913.)

#### **Appeal from Henderson Circuit Court.**

1. **Municipal Corporations—Maintenance of Water Works—When Customer Puts in Pipes for His Own Use—Action by for Loss—When Recovery May Be Had.**—A city which maintains its own water works system must use ordinary care in maintaining its mains and pipes in proper condition, and a customer who uses the water, putting in the pipes on his own property, must use ordinary care to keep them in condition. If a loss occurs where both the parties have been negligent the plaintiff cannot recover if the loss would not have occurred but for his negligence, unless the city after notice of the trouble failed to use ordinary care to avert the loss.
2. **Instructions—When Complaint Cannot Be Made of.**—No complaint of the instructions can be urged on appeal if they are not complained of in the grounds for new trial.

**VANCE & HEILBRONNER** for appellants.

**JOHN C. WORSHAM** for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Affirming.**

Mann Bros. operate a department store at the northeast corner of Second and Main streets in Henderson, Kentucky, in a large three story building. The city of Henderson owns and operates its own water works. The water main runs down Main street on the opposite side

of the street from the Mann building, and six or eight feet from the curb line on that side. Mann Bros. installed a hydraulic elevator in their store building, the water for which was supplied by tapping the main at a point opposite the building with a four inch pipe. The city made the connection with the main and brought the pipe to the Mann property line. Mann Bros. there connected with the city pipe, and carried the water within the building. The connection between their pipe and the city pipe was by means of a lead joint, that is, one pipe went within the other, and lead was packed in between to close the joint. On the morning of May 24, 1911, about nine o'clock a leakage was discovered in the pipe by means of which water was running into the basement of the store, which was used for the storage of much of their stock. When first discovered there was very little water in the basement. The office of the secretary of the Water Company is in the central part of the city; the superintendent's office is at the water works. According to the testimony for the plaintiff, Mann immediately telephoned the secretary telling him of the leak, and asking him to have the water turned off; and according to Mann's testimony, he said that he would tell his men as soon as he could, but he could not locate them at the time. Mann also telephoned to a plumber who came at once, but was unable to locate the cut-off, as he did not know where it had been placed. It was required by ordinance that the cut-off should be placed on the same side of the street as the property and near the curb; but in case of large pipes like this, it was usual to place the cut-off on the opposite side of the street so that if the wall fell in a fire, the cut-off could be reached, and the large stream of water turned off. The plumber seems not to have known this. The city had put some additional rock on the street, and this rock or some of it, had collected over the water box. The plumber dug around looking for the water box, and threw the dirt which he dug or part of it, upon it. Finally about 11:30, and when the stream of water had been running into the basement for over two hours, the superintendent at the water works learned of the trouble and came at once to the scene. As soon as he had the dirt removed from over the water box, he cut off the water, but in the meantime considerable damage had been done to the stock of Mann Bros. in the basement to recover for which they brought this suit against the city, alleging that they had been damaged to the

amount of \$531.20. The city by its answer denied any negligence on its part and pleaded that the loss was due to the negligence of Mann Bros. The proof for the city was to the effect that the only notice that the secretary got of the trouble was that Mann Bros. sent there to borrow a pump which he lent them, and that he was not notified to have the water cut-off. The superintendent was at the water works, and no notice of the trouble reached him until as above stated. While the water box was covered up by a few inches of rock and some dirt, it could easily have been discovered by a person who knew where to look for it, and it was placed where such boxes were regularly placed. The proof for the city also showed that the escape of the water was due to the lead working out of the joint where Mann's pipe joined the city pipe, a joint made by Mann; that after the elevator was installed, the working of the elevator caused what is called a water hammer, and the hammering of the water caused the pipe to leak at this joint. The superintendent called Mann's attention to it telling him it would flood the basement if not fixed; that he must put in an air chamber. Mann had an air chamber put in, but it was allowed to get full of water, and therefore the condition was practically as it was before. The superintendent called his attention to this condition, and told him as before that there was danger of the basement being flooded, but it was not remedied. According to the proof for the city, the superintendent in going there monthly to read the meter often observed the leak and often called Mann's attention to it; but things were allowed by Mann to run along in this way until the trouble in controversy occurred. On this proof the court instructed the jury in substance that it was the duty of the city to use ordinary care in maintaining on its line of water pipe at some suitable point a reasonably suitable cut-off; and if it failed to do this, and by reason thereof, the plaintiffs' premises were flooded, they should find for them; also, that it was the duty of the plaintiffs to promptly notify the defendant after discovering the flow of the water in the cellar, and it was the duty of the defendant to use ordinary care, and diligence on receiving such notice to shut the water off from the building; and if the plaintiffs gave the notice and the city failed to use ordinary care and diligence in turning off the water, they should find for the plaintiffs; but that although the defendant was negligent yet if the plaintiffs were also negligent in

maintaining the connection with the defendant's pipe or was negligent in maintaining the air chamber to the elevator used by them, and that but for such negligence on their part, the injury would not have occurred, they should find for the defendant. The jury returned a verdict in favor of the city. The court having overruled the plaintiffs' motion for a new trial, and entered judgment on the verdict, the plaintiffs appeal.

It is insisted for the plaintiffs that the verdict is palpably against the evidence, but we cannot disturb it on this ground. There was abundant evidence for the city to sustain the verdict of the jury showing that Mann Bros. failed to give the city notice of the trouble, and that if the notice had been seasonably given the loss might have been avoided by it. There was abundant evidence for the city to the effect that the water box was placed at the usual point for the placing of such water boxes and constructed in the proper way. There was no defect in the water box except that it had become covered over with some rock and dirt, and this often happens from the washings of the soil where the water box is not placed in a pavement or solid surface.

It is insisted that the court erred in submitting to the jury the question of contributory negligence. Counsel say:

"And, further, had the air chamber been full of water, had the pipes in the building all been rotten and fallen to pieces, we submit that appellants had the right to rely upon appellee having the safety valve in street accessible and in good condition and so constructed as to shut off the water from the building and prevent damage. We further submit that the safety valve was not accessible or properly maintained when the city permitted two or three inches of dirt and rocks to accumulate on top of the safety valve so that the valve could not be seen or found."

It was the duty of the city to use ordinary care to maintain in proper condition its mains, cut-off and pipes, and it is also the duty of Mann Bros., to use ordinary care to maintain in proper condition their pipes, joints and air chamber. Neither had a right to rely upon the exercise of all care by the other. It is the duty of the city to use ordinary care to maintain its streets in a reasonably safe condition, but it is the duty of those traveling on its streets to exercise ordinary care for their own safety. It is the duty of the master to exercise ordinary

care for the safety of his servant, but it is also the duty of the servant to exercise ordinary care for his own safety. The same rule applies in all departments of life. There was sufficient evidence of negligence on the part of the city to warrant the submission of the question to the jury, but there was also sufficient evidence of negligence on the plaintiffs' part to warrant the submission of that question to the jury. Where the defendant has been negligent and the plaintiff has also been negligent, and by reason of their negligence the plaintiff has suffered a loss, the law does not stop to inquire which was the most negligent; but the general rule is that if the loss would not have happened but for the negligence of the plaintiff, he cannot recover. If the evidence for the city was true, the pounding upon the pipe caused by the defect in the air chamber had produced a leak in the lead joint, and Mann Bros. had been told of the trouble repeatedly, and of the danger of the cellar being flooded from this defect, and had done nothing to prevent the trouble. It is undisputed that the leak occurred in a joint made by them. The city was in no wise responsible for the leak, and the cause of the leak, according to the evidence for the city, was the negligence of Mann Bros. To say that they could allow a four inch pipe to remain in this condition, and recover from the city damages, when the loss would not have occurred but for their own negligence, would be to overrule the well settled principles upon which the law of contributory negligence rests. As the law imposed upon both the parties the duty of using ordinary care, the plaintiffs cannot maintain that the loss was occasioned by the negligence of the city if it would not have occurred but for their own negligence. The water flowed in a continuous stream through the pipes; and the same duty resting on each of the parties to exercise care to maintain in proper condition his part of the system to prevent the escape of the water; the case is not to be distinguished from those involving other like matters, where both parties have been negligent and a loss has ensued.

The single exception to the rule as to contributory negligence is what is known as the doctrine of last clear chance, which is thus stated in *Sherman & Redfield on Negligence*, Sec. 99:

"The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the

injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury."

If the city had failed after notice of the leak to use ordinary care to turn off the water; and avert the danger in which the plaintiffs' negligence had placed them this rule would apply, but this question was submitted to the jury by the instructions of the court.

In addition to this, the instructions were not complained of in the grounds for new trial and cannot be complained of here.

(McLain v. Dibble, 13 Bush, 297, Lawson v. Lightfoot, 27 R., 217.)

Judgment affirmed.

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### **Wilson, et al. v. Reynolds, et al.**

(Decided May 29, 1913.)

Appeal from Todd Circuit Court.

**Deeds—Reformation—Mutual Mistake.**—In an action to reform a deed on the ground of a mutual mistake of the parties, evidence examined and held sufficient to support the decree of reformation.

**SELDEN Y. TRIMBLE and TRIMBLE & BELL** for appellants.

**S. WALTON FORGY, J. R. MALLORY and W. B. REEVES, JR.,** for appellees.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.**

On November 1, 1899, William Perkins and his wife, Jennie Perkins, conveyed to J. T. Halsell and his wife, Willie Halsell, a certain tract of land in Todd County, Kentucky. The consideration was the natural love and affection the grantors had for their daughter, Willie Halsell, and the sum of \$7,000. The deed further provided that the grantees were to board William Perkins and his horse, free of any charge, for and during his natural life, and that one room in the house was reserved to him for his use and occupancy so long as he lived. This obligation on the part of the grantees was made a charge on the land and a lien was retained to secure its performance.

On January 1, 1902, J. T. Halsell and his wife, Willie Halsell, and William Perkins, then an unmarried man, as parties of the first part, conveyed the land in question to C. C. Reynolds, as party of the second part. The consideration was \$9,545.76, of which \$4,927.76 was paid in cash, and the balance represented by certain notes. Perkins joined in the deed for the purpose of releasing his lien. He also made a written release of his lien on the margin of the record of the deed from him to Halsell and wife. The granting clause of the deed was as follows:

"Hath bargained and sold, and do by these presents now sell, alien and convey unto the said second party, his heirs and assigns forever, and should B. E. Reynolds, wife of the said C. C. Reynolds, survive him, the title to the property hereby conveyed shall be and remain in her during her natural life, and at her death to be divided equally between our heirs."

On December 1, 1910, C. C. Reynolds and wife conveyed the land in question to Fred B. Young and his wife, Janie Young. The consideration was \$5,418.75 cash, and two notes for a like amount, payable in one and two years. Young attempted to borrow money on the land to pay off the lien notes. The question was raised as to the character of title C. C. Reynolds took under his deed from Halsell and wife and Perkins.

C. C. Reynolds brought this action for the purpose of having the deed which he received from Halsell and wife and Perkins reformed. In the action Mrs. Reynolds, the heirs of William Perkins, Halsell and wife and their children, as well as the children and infant grandchildren of Reynolds and wife, were made parties. Some of the parties were non-residents and some infants, but all of them were properly brought before the court. The petition alleged that it was the intention of Halsell and wife and William Perkins, and of the plaintiffs, C. C. Reynolds and his wife, B. E. Reynolds, to vest a perfect, fee simple title in C. C. Reynolds and his heirs and assigns forever, but with the provision that if said C. C. Reynolds should not sell or dispose of same prior to his death, and if his wife, B. E. Reynolds, should survive him, she should then have a life estate in said land, and after her death said land should descend to the heirs of C. C. Reynolds. It is further alleged that it was not the intention of the parties to the conveyance to give the plaintiff, B. E. Reynolds, a life estate in said land, unless she should survive C. C. Reynolds and he should fail to



dispose of same prior to his death, and that it was never the intention of the parties to said deed that the land should, in any event, revert to or be divided between the heirs of the grantors; that the habendum clause of the deed above set out, which apparently gave to B. E. Reynolds a life estate in the property whether the property was disposed of or not, and which directed the land, upon her death, to be divided between "our heirs," was the result of a mutual mistake of the parties and a mistake on the part of the draughtsman. Proof was heard and on final hearing the chancellor directed the deed to be reformed so as to carry out the intention of the parties. From that judgment the infant defendants, by their guardian ad litem, prosecute this appeal.

In view of the fact that every person having an interest in the land, either directly or indirectly, was before the court, it is unnecessary to determine whether or not some of them were proper parties. Perkins himself merely joined in the deed to Reynolds for the purpose of releasing his lien on the land. All the adult parties to the suit entered their appearance and consented that the deed be reformed. The depositions of C. C. Reynolds and Thomas Pepper, a banker who drew the deed, were taken. They both testified that it was the purpose and intention of the parties to the deed to vest in C. C. Reynolds a fee simple title, with full power and authority to sell and dispose of the land in question, and that the deed was executed with the understanding that this was the case. It was never the purpose of the parties that the land should revert to or be divided between the heirs of the grantors. Mr. Pepper simply drew the deed in accordance with the direction of Mr. Reynolds and inadvertently placed a limitation on the power of said Reynolds to sell and dispose of the land, and further used the word "our" instead of the word "his." In doing this he made a mistake and did not represent the true intention of the parties. The evidence further shows that Reynolds and wife were not related to Perkins or Halsell and wife. The land was not given to Reynolds. He paid \$9,545.76 for it. Aside from the direct testimony on the question, this fact of itself is sufficient to show that the grantors received full value for the land, and never intended to provide for a reversion to their heirs. The power of a court of equity to reform a deed which, because of a mutual mistake of the parties, does not express their true intention, has been long recognized. In this

case the evidence of the mutual mistake is clear and convincing and fully supports the finding of the chancellor. Judgment affirmed.

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### **Lagerwahl v. White.**

(Decided May 29, 1913.)

#### **Appeal from McCracken Circuit Court.**

1. Attachment—Against Property of Non-resident Defendant.—An attachment under section 194 of the civil code cannot be obtained against a non-resident defendant upon the sole ground of non-residency except on a claim arising on a contract, express or implied, or a judgment or award.
2. Attachment—Against Property of Non-resident Defendant.—An attachment may be obtained against the property of a non-resident upon the grounds specified in subsections 6, 7 and 8 of section 194, when he is about to remove his property, or a material part thereof, out of this State, not leaving enough to satisfy the plaintiff's claim, or has sold, conveyed or otherwise disposed of his property, or is about to sell, convey or otherwise dispose of it, with the fraudulent intent to cheat his creditors. When an attachment is obtained on these grounds, it may be levied upon property of the defendant, whether he be a resident of the State or a permanent or a temporary non-resident.
3. Attachment—Against Property of Non-resident.—An attachment under subsections 2, 3, 4 and 5 of section 194 of the civil code, cannot be obtained against a defendant who has never been a resident of this State. These subsections only authorize an attachment against a resident defendant who has been absent from the State four months, or has departed from the State with the intent to defraud his creditors, or has left to avoid the service of summons, or conceals himself so that a summons cannot be served upon him.
4. Attachment—In Actions to Recover Damages for Tort.—In an action to recover damages for personal injury or other tort, the plaintiff may obtain an attachment against the property of the defendant if he can bring himself within the provisions of the code authorizing such an attachment.
5. Process—Non-resident Doing Business in This State—Service Upon Agent or Manager.—Under subsection six of section fifty-one of the code, authorizing service of summons upon the manager or agent of a non-resident doing business in this State, it is doubtful if a non-resident, who only collects rents from property owned by him in this state and gives to the property such attention as an owner usually does, is doing business in this State within the meaning of this section.

6. **Process—Service as Authorized by Section 56 of the Civil Code—Effect of.**—When a non-resident defendant has been summoned as provided in section 56 of the code, his property in this State, upon which the plaintiff has a contract, attachment, or other statutory lien, may be subjected to the payment of the plaintiff's debt.

**D. G. PARK** for appellant.

**H. S. CORBETT** and **CAMPBELL & CAMPBELL** for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

To understand the points at issue in this case it will be necessary to state at some length the proceedings had in the lower court. In May, 1908, the appellant, Lagerwahl, brought a suit in the McCracken Circuit Court against White to recover damages sustained, as he alleged, by the falling of the wall of a building owned by him. An affidavit for a warning order filed with this petition stated that White was a non-resident of this state and a resident of the state of Tennessee, and that his postoffice address was Nashville, Tenn., and thereupon a warning order attorney was appointed. A summons also issued upon this petition and was executed in August, 1908, upon L. M. Rieke, president of the American German National Bank in McCracken County.

In September, 1908, an amended petition was filed in which it was averred that White was a non-resident of the state and that he owned some business houses in McCracken County, and that the American German National Bank was his agent to rent out his property and collect rents. After this, White, without entering his appearance, moved to quash the return on the summons executed on the president of the American German National Bank upon the ground that he was not engaged in business in this state, nor was the American German National Bank or Rieke his agent.

Before the motion to quash was disposed of by the court, and in December, 1909, Lagerwahl filed another affidavit in which he said that the claim sued on was a just claim and he ought to recover thereon the sum of \$2,000, and that the defendant, J. M. White, had been absent from the state for more than four months past. On the day this affidavit was filed another summons was issued on the petition, and this summons, on the day of its issue, was executed on C. E. Jennings, who it was claimed was an agent for White, and on the same day Lagerwahl

executed an attachment bond, and thereupon an attachment was issued against the property of White, and it was levied upon a business house in McCracken County owned by White.

At the January term, 1910, White, without entering his appearance, made a motion to quash the service of the summons upon Jennings, and upon hearing the motion it was sustained by the court as was also the motion made in September, 1908, to quash the service of process upon Rieke, president of the American German National Bank. After these motions to quash the returns on the summons had been sustained, Lagerwahl filed another affidavit amending his grounds for attachment, in which he said that White "has purposely absented himself from this state and had done so when the attachment was sued out in this action for more than four months in order to avoid the service of a summons on him in this action, and thus so conceals himself that a summons cannot be served on him."

In February, 1910, Lagerwahl filed another amended petition in which he set up that White did not own any personal property in this state, but that he did own the business house upon which the attachment heretofore noticed was levied, and that although White had, previous to the institution of this suit, frequently visited McCracken County, he had since purposely remained out of the county "to avoid service of a summons on him in this action, and he also purposely remained outside the state of Kentucky for the same purpose, or concealed himself elsewhere than in McCracken County in this state, if he has ever returned, for the same purpose, so that such summons could not be served upon him, and plaintiff now says that by reason of his absence from this state in such manner for more than four months before the suing out of his attachment in this action, and his continued absence in such manner ever since, plaintiff has been unable and is still unable to obtain any service of his summons on the defendant in this action, and by reason of such conduct he has been unable to reduce his claim to a judgment or other form of debt than unliquidated damages by reason of such injury, and for such reasons the court should not require any judgment or debt arising upon a contract, or judgment or award in order to sustain his attachment herein sued out."

He further averred that the business house upon which his attachment was levied was worth twenty thou-

sand dollars, and he asked that the court cause a jury to be impaneled, so that his damages might be assessed. After this, and in May, 1910, Lagerwahl caused to be delivered to White, in the state of Tennessee, as shown by the return of an officer, a certified copy of his petition, the summons, warning order, affidavit, attachment, and in fact the entire record that had been made in the case up to that time. In August, 1910, and again in October, 1910, Lagerwahl caused other attachments to be issued and served on various parties as garnishees, and one of the garnishees answered showing that it had in its possession some two hundred dollars due White.

In June, 1911, on motion of Lagerwahl, a jury was impaneled to assess the damages he had sustained and a verdict was returned in his favor for \$2,000, and thereupon judgment was entered reserving all questions concerning the validity of the proceedings, but showing that the damages in favor of Lagerwahl had been assessed at \$2,000.

After this, in November, 1911, another summons was issued against White and another attachment issued against his property, and also an amended and supplemental petition filed, all of which were delivered to White in the state of Tennessee. In this last amended petition Lagerwahl set up the assessment of his damages at \$2,000, and averred that White was a non-resident "and has been absent from this state for more than four months and purposely remains out of the state with the fraudulent intent to avoid service of any summons or other process on him in this state, and so conceals himself that a summons cannot be served on him in this state."

He further averred that he had, with the fraudulent intent to delay him in the collection of his debt, concealed, disposed of, or removed all of his personal property from this state, and so arranged the rents of his property as that they could not be subjected. In March, 1912, on motion of Lagerwahl, it was adjudged that White was indebted to him in the sum of \$2,000, the amount of the assessment by the jury, and that the attachments issued against his property be sustained, and the property levied on under the attachments was ordered to be sold.

After this, White filed this suit in equity seeking to enjoin the sale of his property under the judgment upon the ground that the judgment was void. Upon hearing the case, the lower court ruled that the judgment was

void and enjoined further proceedings under it, and from this judgment this appeal is prosecuted.

To sum up briefly the proceedings in the common law action, it appears (1) that Lagerwahl brought suit against White to recover damages for personal injuries sustained by the negligence of White; (2) that White at all times before and since the institution of this action was a resident of the state of Tennessee, but that when the suit was brought, and at all times subsequent thereto, he owned valuable real estate in McCracken County; (3) that White was proceeded against as a non-resident and affidavits were made stating that he had been absent from the state four months and had departed therefrom with the intent to defraud his creditors and to avoid the service of a summons, and that he had concealed himself so that a summons could not be served upon him, and was about to or had removed a material part of his personal property out of the state with the fraudulent intent to cheat and hinder his creditors; (4) that attachments issued were levied upon real property of White worth twenty thousand dollars; (5) that a jury was impaneled to assess the damages in favor of Lagerwahl and that they returned a verdict fixing his damages at \$2,000; (6) that afterwards a judgment was entered sustaining the attachments levied on this real estate and directing that it be sold to satisfy the assessment; (7) that before the assessment of damages by the jury, there was delivered to White in the state of Tennessee a copy of all the proceedings taken in the case of Lagerwahl against him; (8) that White did not at any time or in any manner enter his appearance in the action of Lagerwahl against him; (9) that White did not remove anything from the state except the rents of his property.

With reference to the service of summons on Rieke, and Jennings, little need be said. It is provided in subsection six of section fifty-one of the Civil Code that "In actions against an individual residing in another state, \* \* \* engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of, such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred," and the service on Rieke and Jennings was under this section.

But it is doubtful if White was engaged in business in this state within the meaning of this section. The only business he carried on in this state was to collect rents

from real property that he owned and to give such attention to the property as an owner usually does, and it is questionable if this was doing business in this state so as to authorize the service of process under the section referred to. We may, however, pass this question as neither Rieke nor Jennings were the agents of White for any purpose, nor did either of them, in any manner, manage or have charge of any business for White in this state.

As White was at all times a non-resident of this state, the question arises, was the levy of an attachment upon his property in this state authorized by the Code? Section 194 of the Code provides "that the plaintiff may have an attachment against the property of the defendant in an action for the recovery of money against (1) a defendant, who is a foreign corporation or non-resident of the State; or, (2) who has been absent therefrom four months; or, (3) has departed therefrom with intent to defraud his creditors; or (4) has left the county of his residence to avoid the service of a summons; or, (5) so conceals himself that a summons cannot be served upon him; or, (6) is about to remove, or has removed, his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim, or the claims of said defendant's creditors; or, (7) has sold, conveyed, or otherwise disposed of, his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors; or, (8) is about to sell, convey, or otherwise dispose of, his property, with such intent. But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this state, for any claim other than a debt or demand arising upon a contract, express or implied, or a judgment or award."

It will thus be observed that sub-section 8 provides that an attachment shall not be granted on the sole ground that the defendant is a non-resident of this State, except for a debt or demand arising upon a contract, express or implied, or a judgment or award. As the demand asserted by Lagerwahl did not arise upon a contract, express or implied, or a judgment or award, it is clear that he could not obtain an attachment against White upon the sole ground that he was a non-resident of the state. The claim of Lagerwahl sounded in tort and was a suit to recover damages for the alleged negligence of White, and, although the plaintiff in such an action

may obtain an attachment against the property of the defendant, he cannot do so upon the sole ground that the defendant is a non-resident of the state. If he obtains an attachment, it must be under some other sub-section of section 194 that authorizes the obtaining of an attachment.

We say that under the circumstances mentioned a plaintiff, in an action to recover damages for personal injuries, may obtain an attachment, because section 194 authorizes attachments in actions for the recovery of money, and sub-section 8 of section 732 provides that "an action for money includes an action for the recovery of damages as well as of money due by contract." *Blewett v. Sprague*, 24 Ky. Law Rep., 1860. But as *Lagerwahl* could not obtain an attachment against the property of *White* upon the ground that he was a non-resident of the state, although an attachment upon this ground is authorized, in an action arising upon a contract, judgment or award, we must look to the other sub-sections of 194 to determine whether any of them authorized an attachment against the property of *White*.

Sub-sections 2, 3, 4, 5, 6, 7 and 8 specify different grounds upon which an attachment may be obtained, but we think that sub-sections 2, 3, 4 and 5 refer to a defendant who is a resident of this state who has been absent therefrom four months, or has departed herefrom to defraud his creditors, or has left the county of his residence, or so conceals himself that summons cannot be served upon him and that an attachment cannot be obtained under these sub-sections against a defendant who has never been a resident of the state. Sub-section 1 of section 194 contains the only authority for the obtention of an attachment upon the sole ground that the defendant is a non-resident. Sub-section 2 authorizing an attachment against a defendant who has been absent from the state four months, evidently means a defendant who is a resident of the state at the time the attachment is obtained, but who has then been absent from the state four months. The wording of the sub-section seems to necessarily exclude a construction that would make it applicable to a defendant who had never resided in the state. Unless the section is construed as we have indicated, then in every case an attachment could be obtained against a person who had never been a resident of the state, because he would in every instance have been absent from the state four months, and there would be no



reason for providing in section 1 that an attachment might be obtained against a defendant who is a non-resident of the state. The fact that sub-section 1 authorizes an attachment against a defendant who is a non-resident also forbids a construction of sub-section 2 that would authorize an attachment against the defendant on the ground that he had been absent from the state four months.

Sub-section 3 refers to a resident defendant who has departed from the state with the intent to defraud his creditors, and sub-section 4 to a resident who has left to avoid the service of a summons, and sub-section 5 to a resident defendant who conceals himself so that a summons cannot be served upon him.

This leaves to be considered sub-sections 6, 7 and 8, which authorizes an attachment against the property of a defendant who is about to remove, or has removed his property, or a material part thereof, out of the state, or who has sold or conveyed, or is about to sell or convey, his property with a fraudulent intent. We think that under these sub-sections, or either of them, a plaintiff who has a claim, whether it arises out of a contract or a tort, may have an attachment against the property of a defendant found in this state whether he be a resident of the state or a permanent or temporary non-resident. In other words, a plaintiff who can make out grounds under either of these sub-sections may obtain an attachment and have it levied upon any property that he can find in this state, without reference to the place of residence of the defendant; and so Lagerwahl had the right to an attachment under either of these sub-sections against the property of White if the facts authorized him to obtain an attachment under them. *Bates Machine Co. v. Norton Iron Works*, 113 Ky., 372. But Lagerwahl did not in his affidavits, for an attachment, bring himself within the provisions of either of these sub-sections. The nearest approach to it was in the affidavit in which he averred that "White has changed the method of collecting his rents on the business house and lot aforesaid, and has sold and transferred and otherwise secretly disposed of such rents, and secretly removed them from this state, and continues to sell, transfer and otherwise secretly dispose of and remove them from this state, all with the fraudulent intent to hinder and delay plaintiff in the collection of his debt aforesaid, and thereby leaves no personal property in

this state, or other property known to plaintiff, except the house and lot aforesaid."

It will be observed that in this affidavit Lagerwahl only charged White with fraudulently removing from the state the rents of his property. He did not charge that he was not leaving sufficient property in the state to satisfy his claim or the claims of his creditors, or that he had sold or disposed of, or was about to sell or dispose of his property with the fraudulent intent to delay his creditors. As it appears from Lagerwahl's pleadings and affidavits that White owned real property in the city of Paducah worth twenty thousand dollars, and there is no suggestion that he was endeavoring to sell or dispose of this real property, it is manifest that Lagerwahl could not make an affidavit that would authorize him to obtain an attachment under either of these sub-sections.

Having the foregoing view as to the proper construction of these sub-sections, and applying the rules announced to the facts shown by the record, it follows that Lagerwahl did not make out a case authorizing an attachment against the property of White, and the court had no jurisdiction to order a sale of the property of White unless authority for this procedure can be found in section 56 of the Code, reading as follows:

"Excepting infants (under the age of fourteen years)—other than married women—and persons of unsound mind and prisoners, if a defendant be out of this state the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning him to appear and answer the petition within sixty days after the same shall have been served on him, and may cause a copy thereof to be delivered to such defendant by a person to whom he is personally known. Proof of the delivery shall be made by the affidavit of the person making it, endorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant, shall be stated. The officer before whom the affidavit is made shall certify that the affiant is personally known by him to be worthy of credit."

But service as directed in this section does not authorize a personal judgment, as section 419 provides that "no personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this state as provided in section 56, and who has not appeared in the action."

It is, however, insisted by counsel for Lagerwahl that, although a personal judgment cannot be obtained on service under this section, it yet authorizes the subjection of the property of the defendant upon which the plaintiff has a contract, attachment, or other statutory lien. If it should be conceded that the property of a non-resident defendant, who was served with process in the manner authorized by section 56, could be subjected under an attachment rightfully issued and levied on his property, this would not help Lagerwahl, because, as we have pointed out, no attachment was or could have been rightfully obtained by him.

For the reasons stated, the judgment of the court in the common law action subjecting the property of White, was void, and the court in the equity action now before us properly enjoined all proceedings thereunder.

Wherefore, the judgment is affirmed.

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### Runyon v. Hatfield, et al.

(Decided May 30, 1913.)

#### Appeal from Pike Circuit Court.

1. **Deeds—Construction.**—Where the caption of a deed is to "George Hatfield and Mary Elender Hatfield his wife during their natural life, thence descend to the heirs of their body of the second part," and the granting clause is "unto the said party of the second part, their heirs and assigns forever," and the habendum clause is "unto the said grantee their heirs and assigns forever," the grantees, George and Mary Elender Hatfield, take only a life estate.
2. **Remainders—Contingent—Descent and Distribution.**—Under a Conveyance "during their natural life thence to descend to the heirs of their body," the children of the life tenant take only a contingent remainder which is not the subject of inheritance.

STATON & PINSON for appellant.

ROBERSON, LANGLEY & COOPER for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

On March 2, 1877, Mitchell Runyon and Margaret Runyon, his wife, conveyed certain lands lying in Pike County, Kentucky, to George Hatfield and Mary Elender Hatfield, his wife. Thereafter by mesne conveyances

the property was conveyed to Albert Runyon, who brought this action against the children of George Hatfield and Mary Elender Hatfield to quiet his title. A demurrer was sustained to his petition and the petition dismissed. From that judgment this appeal is prosecuted.

The propriety of the trial court's action depends on the proper construction of the deed of March 2, 1877, the material parts of which are as follows:

"THIS INDENTURE made this 2nd day of March, 1877, between Mitchell Runyon and Margaret Runyon, his wife, of the county of Pike and State of Kentucky of the first part and George Hatfield and Mary Elender Hatfield his wife during their natural life, thence descend to the heirs of their body of the second part.

"WITNESSETH, That the part of the first party, in consideration of the sum of seven hundred dollars, four hundred dollars, on Jacob Smith, Sr., and three hundred on Ransom Hatfield and George Hatfield, his son hath bargained and sold and by these presents doth convey and confirm unto the said party of the second part their heirs and assigns forever, a certain tract or parcel of land, lying in the county of Pike and State of Kentucky and described as follows, viz:

\* \* \*

"To have and to hold the said property, with its appurtenances thereunto belonging unto the said grantee their heirs and assigns forever. And the said party of the first part doth further covenant with the said party of the second part that they will warrant generally the title to the property hereby conveyed."

It will be observed that in the caption Mitchell Runyon and Margaret Runyon are the parties of the first part, while "George Hatfield and Mary Elender Hatfield his wife during their natural life, thence descend to the heirs of their body" are the parties of the second part. The granting clause is "unto the said party of the second part, their heirs and assigns forever." The habendum clause is "unto the said grantee their heirs and assigns forever."

In construing a deed it will be read as a whole and if, upon a consideration of the whole instrument it appears that it was the intention of the parties to vest a less estate than a fee in the grantee, that intention will be carried into effect. And when the intention as manifested in the language is to convey a life estate with

remainder over, there has been no disposition to defeat by construction the purpose of the grantor. *Harkness v. Meade*, 148 Ky., 565; *Wilson v. Moore*, 146 Ky., 679; *Lawson v. Todd*, 129 Ky., 133; *Atkins v. Baker*, 112 Ky., 877. In the present case the granting and habendum clauses are reconcilable with the caption, which plainly shows an intention to vest in George and Elender Hatfield only a life estate.

In this State we have the following statute (Section 2345):

"If any estate shall be given by deed or will to any person for his life and after his death to his heirs, or the heirs of his body, or his issue or his descendants, the same shall be construed to be an estate for life only in such person and a remainder in fee simple in his heirs or the heirs of his body."

The language of the deed brings it within the express terms of the statute, and it therefore follows that George and Mary Elender Hatfield took only a life estate in the property in question.

It appears that George and Mary Elender Hatfield are still alive. Eleven children have been born to them. Of these, two died in infancy and two after arriving at age. All four died intestate and without issue. All the parties, including George and Mary Hatfield, conveyed the title to the land by deeds containing covenants of general warranty. Plaintiff therefore insists that as George and Mary Hatfield inherited the interest of their four children, their interest passed to him under and by virtue of the covenants of warranty. The determination of this question depends upon the character of estate which the children of George and Mary Elender Hatfield took under the deed of March 2, 1877. It is well settled that in the absence of anything in the instrument showing that the words "heirs" or "heirs of the body" were used in the sense of children, a remainder to the life tenant's heirs or the heirs of his body is contingent, for, until his death, it cannot be determined who his heirs will be. *Preston on Estates*, 77; *Fearne on Remainders*, 7; 4 *Kents Comm.*, 207; *Williamson v. Williamson*, 18 B. Mon. 328.

As the interests of the children were contingent upon their surviving their father and mother, and as they did not survive them, it follows that they had no interest which their father and mother could inherit.

Judgment affirmed.

**Fain, et al. v. Heathman, et al.**

(Decided May 30, 1913.)

**Appeal from Fayette Circuit Court.**

1. **Vendor and Purchaser—Lien as Security for Purchase Price—Assignment of.**—Where a vendor of real estate holds liens as security for the purchase price, upon two parcels of real estate—the lot sold by him and another his vendee had sold a third person, the lien retained upon which for unpaid purchase money, had been assigned to him—he had the right in one and the same action, to enforce both liens, and it was not error for the court in rendering judgment to direct that the lot sold by the vendor be first subjected to the payment of his debt.
2. **Married Women—Personal Judgment Against—When May Be Rendered—Rights of Married Women.**—A personal judgment may properly be rendered against a married woman whether sued jointly with her husband or singly, if the obligation be one upon which she is individually liable otherwise than as a surety. Since the adoption of section 2128, Kentucky Statutes, a married woman has every right to acquire, hold and dispose of property, real or personal, and to contract, sue and be sued, possessed by the husband, "except that she may not make any executory contract to sell, or convey, or mortgage her real estate, unless her husband join in such contract;" nor can she become a surety.

R. S. CRAWFORD for appellants.

W. C. G. HOBBS, JOS. S. BOTTS and FALCONER & FALCONER for appellees.

**OPINION OF THE COURT BY JUDGE SETTLE—Affirming.**

December 18, 1895, the appellants, Talitha C. Fain, and Thomas A. Fain, her husband, sold to the appellees, Talitha Heathman and Joseph Heathman, her husband, two lots in the city of Lexington, the contract being evidenced by the following writing:

"This contract made this 18th day of December, 1895, between Talitha C. Fain, and Thomas A. Fain, her husband, of Lexington, Kentucky, parties of the first part and Talitha Heathman, wife of Joseph Heathman, of Lexington, Kentucky, party of the second part, witnesseth:

"That the said party of the first part hereby agrees to sell and convey to the said party of the second part, for the consideration hereinafter named, those two certain tracts or parcels of land, described and bounded as

follows, both of said tracts being situated in Fayette County, Kentucky:

“First, the south 20 feet of lot 18 in block 1 of Forest Hill, as shown on pages 38 and 39 of Plat Book No. 1 in the office of the clerk of Fayette County Court, fronting 20 feet on the west side of Georgetown street and extending back 125 feet to lot 19 on said block and bounded on the south by lot 17 in the same block, and on the north by 30 feet of lot 10 to 18, heretofore conveyed to Maggie J. Warren, and by her conveyed to said parties of the first part hereto; the property above described being the same property conveyed to the first parties hereto by deed from the Forest Hill Land Company, dated October 4, 1892, which is to be recorded in the Fayette County Clerk's office.

“Second, that certain tract of land described as follows: The north 30 feet of lot 18 in block 1 of Forest Hill, as shown on the above mentioned plat, fronting 30 feet on Georgetown and Elm streets, and running West along Elm street 125 feet to lot 19, thence south along 19, 30 feet, thence east parallel with Elm street 125 feet to Georgetown street, thence north along Georgetown street 30 feet to the place of beginning; being the same property conveyed to the parties of the first part by Maggie J. Warren, et al., by deed dated October 20, 1892, recorded in Deed Book 97, page 553.

“And when the purchase price hereinafter named is fully paid, according to the agreement herein set out, the first parties covenant and agree with the second party that they will furnish to the said second party a good and sufficient title to the said real estate with covenant of general warranty, by deed duly executed, acknowledged and delivered by the first parties. The second party, on her part, in consideration of the above named agreement, agrees to pay for the said real estate, to the said first parties the sum of two thousand dollars (\$2,000), with interest thereon at six per cent per annum from this date until paid; but the said purchase money is to be paid as follows, that is to say; the second party has taken out ten certificates in the Southern Mutual Investment Company of Lexington, Kentucky; Now then, the said certificates shall be, and they are hereby, assigned to the said first parties as collateral to secure further the payment of the said purchase price for the said real estate; and the said first parties are hereby authorized to collect all matured coupons on the said certifi-

cates and renewals thereof, until they have received said purchase price and interest in full; except this; that enough of the coupons first matured shall be applied to the payment of any and all liens now existing against the said real estate or any part thereof, and when enough coupons on said certificates or renewals thereof shall have matured and been paid to cover said purchase price, after deducting such part thereof as shall be paid to relieve the said real estate herein described from the encumbrance now existing thereon, said first parties covenant and agree that they will execute, acknowledge and deliver to the second party a good and sufficient deed with covenant of general warranty for the said real estate.

"The second party agrees that she will, each and every month, pay into the said Southern Mutual Investment Company, according to its rules, the dues on said certificates or renewals thereof, that is to say two dollars, (\$2) per month on each of said certificates or renewals thereof; and that she will renew said certificates and coupons thereon as fast as they mature; and if at any time the second party should be in default in any of the said payments for as long as three months then all of the said unpaid purchase price above agreed upon with interest thereon up to that date shall be due and payable and the said first parties shall have the right to carry the said certificates in the said Southern Mutual Investment Company and to own the same absolutely.

"The second party agrees to pay all future taxes and insurance on the said property and to keep the said property insured in some reliable fire insurance company, for at least the sum of ..... dollars (\$.....) until it is fully paid for, the loss, if any, to be made payable to the parties of the first part as their interest may appear.

"TALITHA C. FAIN,  
"THOS. A. FAIN,  
"J. B. HEATHMAN,  
"TALITHA HEATHMAN."

August 9, 1897, the appellants, Talitha C. and Thomas A. Fain, purchased of Asa Dodge a house and lot in the same city upon the term and conditions set forth in the following contract:

"This contract made this the 9th day of August, 1897, between Asa Dodge and Talitha C. Fain and



Thomas A. Fain, her husband, all said parties are of Lexington, Fayette County, Kentucky.

"The party of the first part, Asa Dodge, hereby agrees to sell and convey to, the said parties of the second part with all improvements thereon, situated and located on South Limestone street in the city of Lexington, Fayette County, Kentucky, being number 367, adjoining in the south, John O'Neill and on the north—Hall for 100 feet, fronting on South Limestone street sixty feet and running northwest parallel lines one hundred and fifty (150) feet; being 60x150 ft., for and in consideration of nineteen hundred dollars (\$1,900). And when the purchase price herein named is fully paid according to agreement herein set forth, the first party covenants and agrees that he will furnish to the second party a good and sufficient title to the said real estate, with covenant of general warranty, by deed duly executed, acknowledged and delivered by the first party.

"The parties of the second part on their part; in consideration of the above named agreement, agree to pay to the party of the first part the sum of nineteen hundred dollars (\$1,900) with interest thereon at six per cent per annum from this date until paid; but the said purchase price is to be paid as follows, that is:

"The second parties hold a written contract with one Talitha Heathman, wife of Joseph Heathman, of Lexington, Kentucky, for certain real estate in Fayette County, Kentucky, for two thousand dollars (\$2,000). For the payment of said two thousand dollars said Talitha Heatman has taken out ten certificates in the Southern Mutual Investment Company. Said certificates are to be kept in force until a sufficient number matures to liquidate said two thousand dollars and said interest. In said contract it is stipulated that certain debts against said real estate shall be liquidated first by maturing coupons, and it is here understood that J. H. Baker is to receive out of the first maturities forty dollars (\$40) commission charged to said Talitha Fain and husband (said contract between said Talitha Fain and Thomas A. Fain, her husband, and said Talitha Heathman, and Joseph Heathman, her husband, is hereby assigned and turned over to said Asa Dodge and also said certificates are hereby assigned as collateral to said Asa Dodge to secure the full payment of said nineteen hundred dollars and interest). When said amount and interest is fully paid the remaining coupons shall be

turned over to said Talitha Heathman, provided she has paid the said two thousand dollars to said Talitha Fain or Asa Dodge; otherwise said remaining coupons shall be by said Asa Dodge turned over to said Talitha Fain. It is further agreed that said Asa Dodge shall collect for six months from the date hereof the rents on said real estate on said South Limestone street. After said six months shall have expired said rents shall belong to and be paid to said Talitha Fain. All future insurance and future assessed taxes shall be paid by said Talitha Fain. Said property shall be kept insured for at least \$600 in some good reliable insurance company, loss, if any, payable to Asa Dodge as his interest may appear.

“ASA DODGE,

“TALITHA C. FAIN,

“THOMAS A. FAIN.”

It will be observed that in the contract last mentioned not only was the payment of the consideration for the lot therein described secured by a lien on the lot, but also by a pledge and assignment, as collateral, of the certificates of membership in the Southern Mutual Investment Company, taken out by the Heathmans, as required by their contract with the Fains; it being stipulated that whatever money was received by Dodge on the collateral from the Heathmans, should be applied first, to pay J. H. Baker \$40; second, to pay certain debts against the real estate purchased by the Heathmans of the Fains; third, the balance, if any, so far as it would answer for that purpose, to be applied in satisfaction of the purchase price of the house and lot sold by Dodge to the Fains.

After the making of the contract between Dodge and the Fains, the former died testate and following the probating of his will, the appellee, Security Trust Company, of Lexington, named therein as executor, duly qualified as such. In the meantime the Southern Mutual Investment Company became insolvent and went into the hands of a receiver. In winding up the affairs of the Investment Company, Dodge's executor was paid by the receiver on the collateral assigned the testator by the appellants \$103.33, June 20, 1911, and the further sum of \$51 July 15, 1911.

The Heathmans having ceased to continue payments to Dodge under the contract they had with the Fains, and the latter having refused to pay the purchase price due on the lot they purchased from Dodge, the executor of

Dodge sued all of them in the court below for the collection of the purchase money due the testator's estate on the lot he sold the Fains; to that end seeking personal judgment against each of the four and the enforcement, first, of the lien on the lot sold the Fains, second, the lien on the lots sold by the Fains to the Heathmans, which, with the contract creating it, had been assigned the testator by the former.

The answer of the appellants, Talitha C. Fain and Thomas A. Fain, denied any indebtedness to the estate of Asa Dodge and, in substance, alleged that at the time they purchased of Dodge the lot described in the contract made with him, they paid him the entire consideration by assigning him the contract of sale made by them with Talitha Heathman and her husband and the collateral consisting of ten certificates in the Southern Mutual Investment Company, which contract and collateral he accepted in full satisfaction of the price appellants agreed to pay him for the lot, without recourse on them. Moreover, that the lot sold them by Dodge was valued in the trade at \$850 and this was the price they paid for it, but that in the contract of sale, \$1,900 was stated to be the consideration, because that was within \$100 of the aggregate face value of the collateral assigned to Dodge which they had received from the Heathmans. The answer was made a cross petition against the appellees, Talitha and Joseph Heathman, and judgment prayed against them for such amount, if any, as might be recovered by the executor of Dodge against appellants and that a lien be adjudged them against the lots they sold the Heathmans, therefor. The executor by reply controverted all affirmative matter of the answer. The appellees, Talitha Heathman and Joseph Heathman, in answering the petition of Dodge's executor and the cross-petition of the appellants Talitha C. and Thomas A. Fain, alleged the full payment to them and to Asa Dodge of the purchase price they agreed to pay appellants for the two lots they purchased of them, which they further alleged was \$700 and that this sum was its agreed value, but that \$2,000 was expressed in the contract of sale as the consideration for the lots, because that was the face value of the certificate in the Southern Mutual Investment Company, through the payment of premiums or coupons on which, it was intended the purchase price of the lots should be paid. The answer further alleged that in this way the appellants and Dodge, to whom these certi-

ificates were assigned, by appellants, were paid in full the purchase price due on the two lots they purchased of the latter; and such payment, it was further alleged, entitled the appellees, Talitha and Joseph Heathman, to a deed from appellants conveying them the lots, and such deed the court was asked to require them to make. The affirmative matter of this answer was controverted by the reply of appellants and that of the executor of the will of Dodge.

The record contains a statement of facts to which it is admitted all the parties agreed and from this statement it appears that the appellees, Talitha and Joseph Heathman, after the assignment by appellants of the contract and collateral to Dodge, paid him for appellants \$154.47, of which amount he applied \$109.54 to the extinguishment of a lien on the lots sold them by appellants, as required by the contract between them, and also by the contract between appellants and Dodge, and this payment left of the \$154.47 received by Dodge, \$44.93 which he applied as a credit on the debt due him from appellants.

The case was submitted in the circuit court upon the agreed facts and certain issues indicated in writing by the parties. By the judgment then rendered these issues were in the main decided as contended by the appellee Security Trust Company, executor of the will of Asa Dodge, and the case referred to the Master Commissioner to take proof and report as to payments made appellants and Asa Dodge by the appellees, Talitha and Joseph Heathman, the value at the time of their sale of the lots purchased by the latter of appellants, and of that purchased by appellants of Dodge and what liens there were upon the two lots first mentioned.

After taking proof the commissioner made his report to which exceptions were filed and overruled and the report confirmed. Upon a second submission of the case, it was finally adjudged by the court that \$1,000 instead of \$1,900 was the fair market value of the lot purchased by appellants of Asa Dodge, and the actual consideration they were to pay for it, and for this amount and its costs the executor was given a personal judgment against each of the appellants, with interest from August 9, 1897, credited by \$44.92 as of June 20, 1911, and \$51. as of July 15, 1911. It was also adjudged that the executor had a lien upon the lot purchased by appellants from Asa Dodge to secure the payment of the amount re-

covered, which was ordered to be sold by the commissioner in satisfaction thereof, and that the property being indivisible should be sold as a whole. On the issues as to the appellees, Talitha and Joseph Heathman, the agreement of the parties having fixed the value of the lots purchased by them of appellants at \$800, it was adjudged by the court that they were only indebted to the executor of Dodge under the assignment to the latter of their contract with appellants, in the sum of \$171.79, with interest from July 15, 1911, and for this amount and interest the executor was given a personal judgment against each of the Heathmans and a lien upon the two lots in question, which, or enough thereof for the purpose, it was further adjudged be sold by the commissioner to satisfy the debt of \$171.79 and interest. The judgment also provided that certain tax liens on the several lots to be sold be first paid, and as to these tax liens there seems to have been no controversy.

The appellants, Talitha C. Fain and Thomas A. Fain, being dissatisfied with the judgment on each branch of the case, have appealed. The first question presented by the appeal is, were the certificates of membership of the Heathmans in the Investment Company, which they had taken out to enable them to pay for the lots they purchased of appellants, assigned by the latter to Asa Dodge in absolute payment of the consideration they were to pay him for the lot they purchased of him, or as collateral security therefor. Manifestly, the circuit court correctly decided that it was assigned for the latter purpose. The contract between Dodge and the appellants establishes this fact and as it was not attacked on the ground of fraud or mistake, the parties are concluded by its terms; besides, even if such attack had been made upon the contract, neither of the appellants could testify to the contrary in view of the death of Dodge. The second question is, was it proper for the court to adjudge a sale of the lot Dodge sold appellants for the payment of the purchase money due thereon, before first selling the lots of the Heathmans and their certificates in the Investment Company in satisfaction thereof. This question is not material in view of the fact that the collateral is now admittedly without value, and the further fact that the small amount admittedly owing by the Heathmans on the debt of appellants to Dodge's executor will, in any event, pay such a small part thereof that the sale of appellants' lot will not, after satisfying the

tax liens thereon, even if it brings much more than the value given it by the report of the commissioner, discharge the balance of the debt of the executor. It is immaterial, therefore, whether appellants' lot is sold first or last.

The third question is, did the court err in holding that the true consideration for the sale of the real property in each of the contracts was the amount named as to each by the judgment. Obviously not, as the ruling of the court is sustained by the record. Moreover, appellants are not prejudiced by the holding of the court that the amount they owe the executor of Dodge's will, is less than it would be if their contention as to what the contract was, were sustained. It is not true, as claimed in the brief of appellant's counsel, that the judgment against appellants is in the alternative. It is against both and each of them. Nor is their further contention that a personal judgment cannot be rendered against a married woman tenable. Section 2128, Kentucky Statutes, confers upon a married woman every right to acquire, hold and dispose of property real or personal, and to contract, sue and be sued, possessed by the husband, "except that she may not make any executory contract to sell or convey or mortgage her real estate, unless her husband join in such contract;" nor can she become a surety.

In numerous cases decided since the enactment of this statute we have held that a personal judgment may be recovered against a married woman. *Hazen, &c. v. Collossal Cavern Co.*, 25 R., 502; *Coleman v. Coleman*, 142 Ky., 39.

Manifestly the judgment against Talitha C. Fain was proper; she jointly purchased with her husband the lot they bought of Dodge and by the terms of the contract became jointly bound with him for the payment of the consideration, for which reason the executor was as much entitled to a personal judgment against her as against her husband.

On the whole record we are satisfied that the judgments correctly determined the rights of all the parties, therefore, they are affirmed.

**Asher v. Simpson.**

(Decided May 30, 1913.)

## Appeal from Bell Circuit Court.

1. **Contracts—Ambiguity—Meaning That Should Be Given by Chancellor.**—Where the parties to a contract, ambiguous in its terms, have put their own interpretation upon it by their action under it, a chancellor will not go into technical rules of construction in determining its meaning, but will give it that meaning which the parties themselves have put upon it.
2. **Specific Performance—Action for—Laches—Evidence.**—In an action to enforce specific performance of a contract to convey land, evidence examined and held that appellee was not guilty of such laches as to deprive him of the right to such relief.

T. L. EDELEN for appellant.

A. G. PATTERSON for appellee.

## OPINION OF THE COURT BY JUDGE TURNER—Affirming.

Prior to the 7th of January, 1904, appellant was the owner of several tracts of land in Bell County, and appellee was the owner of a single tract in Leslie County.

Appellant is an extensive dealer in timber and timber lands, and on the 7th of January, 1904, he and appellee entered into the following written contract, to-wit:

“A. J. Asher and Isaac Simpson, agree as follows: (A. J. Asher of Bell County, Kentucky and Isaac Simpson of Leslie County, Kentucky), to exchange lands.

“Said Simpson agrees to convey all the lands he owns on Marrowbone and adjacent waters in Leslie County, Kentucky, by deed of general warranty to A. J. Asher, said land covered by a 140 acre survey made in the name of Isaac Simpson, No. 64075, surveyed October 29, 1890, and patented March 9, 1891, being the lands now occupied by Isaac Simpson, and for which lands A. J. Asher agrees to convey to said Simpson by deed of general warranty an equal number of acres lying on Kettle Island and waters of the right fork of Straight Creek in Bell County, Kentucky.

“Beginning at the mouth of said Kettle Island, thence up with the bed of said creek to about opposite or a little below the house where Henry Hubbard now lives, thence leaving said creek to include about one and one-half acres on the right as you go up, including the barn, thence back to the creek and up with the creek to near Sol

Baker's line, thence leaving the creek so as to include about one acre on the right side of said creek, thence back to the creek and Sol Baker's line, thence with said Baker's and Asher's line to Sam Brock's line, thence with said Brock's line to the top of the ridge between Right and Left Fork of Straight Creek, thence back with the mountain and said Asher's back line to A. W. Pickering's line, thence with same to the beginning.

"Said Asher reserves right of way for a railroad to be laid off through said land agreed to be conveyed, to be laid off the usual widths of rights of way laid off by railroad, and if a railroad should be built by said Asher or his assigns in the future through said land and said Asher or his assigns should need or require more land than said railroad right of way includes upon which to erect coke ovens, tipples or other mining structures, they reserve the right to take the same, but to pay said Simpson or his assigns the sum of one hundred (\$100) dollars per acre for such land so taken outside of said right of way.

"Said Simpson agrees to stay where he now lives until the poplar timber is cut and removed from said tract of land and to pay no rent for same, and he agrees for a reasonable compensation (provided both parties can agree) to dictate and manage the getting out of said poplar timber.

"Said Simpson reserves the right to allow R. L. Lewis to get out said Lewis poplar timber.

"Said Asher has immediate possession of said Simpson lands for the purpose of getting out the timber therefrom but said Simpson is to hold possession otherwise as above specified.

"When said timber is removed said Asher is to have full possession of said land except in time of growing crops.

"Said Asher gives possession to said Simpson in thirty days.

"Said Simpson having sold eighteen poplar trees to E. L. Morgan said Asher stands good for same.

"Said Asher agrees to cut twenty-five hundred (2,500) feet of lumber for said Simpson free of charge.

"In case said Simpson has more acres in his above described tract than said Asher's described tract, said Simpson agrees to take the acreage on the S. W. corner of said Asher's land adjacent the Sam Brock tract and back of same or west of same."



As appears from the face of the contract, appellant wanted the Simpson lands especially for the timber, and immediately after the execution of the contract, through his agents, proceeded to take the merchantable timber from the Simpson tract, Simpson remaining thereon and superintending the getting out of the timber for Asher. About a year later Simpson moved to the Kettle Island tract of land in Bell County referred to in the contract and took possession of it.

A year or two after the contract, one George V. Turner instituted an action in the Federal Court against Asher and Simpson claiming to be the owner of the tract of land under an old patent, but before the case came to trial Simpson paid Turner five hundred dollars (\$500) for a quit claim deed to his interest in the Simpson tract, and this deed of course, enured to the benefit of, and was intended to perfect the title both of Asher and Simpson.

Upon one pretext or another, Asher persistently refused to make the conveyance provided for in the contract, saying at one time that his wife was in California and that he could not therefore make the conveyance, and at other times that he was dissatisfied with the survey of the Leslie County lands, and wanted them re-surveyed.

This action was instituted on the 19th of January, 1911, by appellee alleging that the Leslie County tract of land owned by him, and embraced in the contract above quoted, contained 357 88-100 acres, and that the Kettle Island tract of land owned by appellant, referred to therein, contained 281 7-10 acres of land; and further, that since the execution of the contract of the 7th of January, 1904, appellant had sold the tract of land referred to in the said contract as adjacent to the Sam Brock tract, and out of which it was agreed that appellee was to have this deficit of 76 18-100 acres, and had received therefor thirty five (\$35) dollars per acre; and prayed for a specific performance of the contract as to the Kettle Island tract, and for a judgment against appellant for the amount he received for the 76 18-100 acres so sold by him off of the tract adjacent to the Sam Brock tract.

Appellee tendered with his petition a deed in due form executed by him and his wife to Asher for the Leslie County lands.

The court adjudged a specific performance as to the Kettle Island lands, and entered a judgment for appellee for \$2,666.30 with interest from the date of the fil-

ing of the suit as representing the 76 18-100 acres, the land which appellant agreed to convey to appellee, and which he sold at the price of \$35 per acre.

Appellant seeks a reversal upon two grounds: (1.) That the description in the contract of the Simpson lands as "all the lands he owns on Marrowbone and adjacent waters in Leslie County, Kentucky \* \* \* said land covered by a 140 acre survey made in the name of Isaac Simpson, No. 64075, surveyed October 29th, 1890 and patented March 9, 1891, being the lands now occupied by Isaac Simpson" only embraces the land owned by Simpson within the 140 acre survey, and that he (appellant) cannot be required to take under the terms of the contract any land outside of that patent.

(2.) That the appellee has been guilty of such laches and delay as that the situation of the parties has changed, and he is therefore not entitled in equity to a specific performance.

Where the parties to a contract, ambiguous in its terms, have put their own interpretation upon it by their action under it, a chancellor will not go into the technical rules of construction in determining its meaning, but will give it that meaning which the parties themselves have put upon it. In this case immediately after the execution of the contract, Asher proceeded to take the merchantable timber from the whole Simpson tract, not confining himself to that part of it embraced within the 140 acre patent. This action of his immediately after the execution of the contract, and which was acquiesced in, and actually participated in by the appellee as Asher's employee, is most conclusive that the parties themselves understood at the time that Simpson was selling and Asher was buying the whole of the Simpson tract.

The evidence is that appellee himself had lived upon that same tract of land for thirty-five years, had raised his whole family there; that his, and his wife's ancestors had lived upon it for years prior to that, and that his possessory title to the whole tract was good, and that there is now no other known claimant to any part of it.

To now permit the appellant after receiving the full benefit of what he chiefly contracted for (the merchantable timber on the Simpson tract) to deny to appellee that which he contracted for, (the same number of acres of land in Bell County, or its equivalent) would be to work out a result abhorrent to equitable principles. The

parties entered into this contract with their eyes open, they were on the ground when it was made, the lines were pointed out the very day it was executed, they have by their own acts under it immediately after its execution plainly pointed out what was in their minds when they made it, and the courts will not interfere with that interpretation.

No time was fixed in the contract for its performance by either party, and time was therefore not of the essence of the contract. The evidence is that Asher agreed orally to have both tracts surveyed, and that he did have the Simpson tract surveyed, but subsequently said that he was dissatisfied with that survey, and actually had it resurveyed after this suit was instituted.

The Federal Court suit necessarily caused some delay in the carrying out of this contract; the absence of Asher's wife in California another time was pleaded by him as cause for further delay, and it appears throughout the record that he was dilatory in carrying out his agreement to have these two tracts of land surveyed.

Under these circumstances there was no such laches as deprived appellee of the right to a specific performance.

The judgment does substantial justice between the parties and is affirmed.

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### Crump, et al. v. Chenault, et al.

(Decided May 30, 1913.)

#### Appeal from Clark Circuit Court.

1. **Wills—Contest—Burden of Proof.**—The rule is well settled that after due execution of a will is proved by the propounders, the burden of showing that the instrument is invalid upon the ground that it was procured by the exercise of undue influence, is upon the contestants; and this must be shown by evidence at least tending to establish that undue influence was exercised upon the testator.
2. **Wills—Contest—Undue Influence.**—In order to establish undue influence in the execution of a will, it is not sufficient that it be shown that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised; some evidence must be adduced showing that such influence was exercised.

3. Evidence—Will Contest—Testator's Mental Condition.—It is admissible to show the mental condition of the testator at the time his will was made, and his susceptibility to influence by which he was surrounded at the time; but it must be accompanied by some other evidence that the will was executed as the result of undue influence before the case will be permitted to go to the jury.
4. Evidence in Will Contest—What Is Evidence.—The foregoing rule does not conflict with the scintilla rule, since that rule requires some evidence, even though it be slight; and by evidence is meant something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of proof or having fitness to induce conviction.

PENDLETON, BUSH & BUSH, CLAUDE M. THOMAS, J. M. STEVENSON, O'REAR & WILLIAMS and ED. C. O'REAR for appellants.

JOUETT & JOUETT R. A. CHILES, LEWIS APPERSON, C. F. SPENCER and S. T. DAVIS for appellees.

OPINION OF THE COURT BY JUDGE MILLER—Affirming.

This is an appeal from a judgment of the Clark Circuit Court sustaining the will of Alexander H. Anderson. The will was probated in the county court, and upon an appeal to the circuit court the contestants, who are appellants here, sought to set aside the will, upon the two grounds, (1) that Anderson did not have testamentary capacity to make a will, and (2) he was unduly influenced therein by his nephew Albert A. Clay. At the conclusion of contestants' evidence, the circuit judge peremptorily instructed the jury to find for the propounders, and from that judgment the contestants prosecute this appeal. This state of the record therefore, requires a careful examination of the evidence, with the view of determining whether there was sufficient evidence to carry the case to the jury.

Alexander H. Anderson owned and resided upon a farm containing more than a thousand acres, of unusual beauty and fertility, and located at "Indian Fields" in the southeastern portion of Clark County. The farm is worth \$100,000.00 or more. The will in contest was executed on February 14, 1902, when Anderson was over 76 years of age. He lived seven years longer, and died on May 23, 1909, at the age of eighty-three. During the last five or six years of his life his eye sight had gradually failed, until at the time of his death he could scarcely see at all. In other respects, however, he ap-

peared to be sound and vigorous in both mind and body. His nephew, Albert A. Clay, commonly called "Ab." Clay, had been for many years his partner in a general store at "Indian Fields." Up to a short time before his death Anderson continued to go to the store twice a day, but these visits grew less frequent as his sight became worse. Anderson, however, never ceased to take his usual interest in his business, his wife reading to him and keeping him as fully informed of the events of the day as he could have done by reading for himself. He left a widow, but no children. He had had six brothers and sisters, of whom only one, a sister, Mrs. Susan Young, was living at the time the will was made. The other brothers and sisters were then all dead, but all of them had left descendants.

The will conveyed the estate to Hensley and Hathaway in trust, with instructions to rent out the lands and divide the net annual proceeds into six equal shares, of which one share was to go to the family of each of four brothers and sisters, while in the case of his deceased sister, Mrs. Clay, he gave one portion to each of the families of her two sons Albert A. Clay and Julian Clay. He gave no interest whatever to the children of his deceased brother Milton Anderson, who had died in 1863 leaving two daughters, who are the appellants, Mrs. Martha C. Crump and Mrs. Susan Rye. The shares were all devised upon precisely the same terms; and, as an illustration of those conditions, we quote the first clause making the devise to Albert A. Clay's family, which reads as follows:

"I direct that one of said shares shall belong to and be paid by my said trustees to my nephew, Albert A. Clay, annually as long as he lives, and after his death that said share shall be paid annually, in equal portions, one portion to each of the children of the said Albert A. Clay born in lawful wedlock, and *per stirpes* to the descendants of such children as may then be dead, and which said designated children and descendants are in being at the time of my death, to them during their lives and to their descendants *per stirpes* for twenty-one (21) years after the death of said Albert A. Clay's thus designated children and the above designated descendants of such children."

The testator had made a former will in 1892, and while that will has not been produced, it appears from the testimony of Mrs. Custis A. Smith that the testator told

her in 1895 that he intended to give all of his nieces an equal share in his estate.

The will was drawn by Leeland Hathaway, a prominent lawyer of Winchester, and was witnessed by C. C. Curry and A. B. Curry. By an unimportant codicil executed November 9, 1903, and drawn by Curry, the testator directed the portion going to the sons of his brother Albert G. Anderson to be held in trust for their benefit. This codicil also appointed Albert A. Clay his nephew, and English Anderson his great-nephew, executors of his will.

By a second codicil executed August 17, 1905, and likewise drawn by Curry, and witnessed by Curry and his brother, the testator added C. C. Chenault to the list of his executors.

It will be seen that the first takers under the will are all limited to a life-estate, and that none of his living descendants takes a fee. All, however, are treated substantially alike. While Mrs. Crump and Mrs. Rye are the only contestants who take nothing under the will, they are not, however, the only contestants, since they are joined by English Anderson and his three children, and twenty-one other devisees under the will.

Upon the question of the testamentary capacity of the testator there was a total absence of proof, except the testimony of the attesting witnesses and several witnesses introduced by the contestants, all of whom clearly establish his testamentary capacity. There was no evidence to the contrary.

Anderson was a man of many peculiarities. Although a rich man, he and his wife lived alone in a cottage of four rooms, generally without a servant, although that fact is not unusual in country districts where servants are not easily obtainable. That he was stingy is conceded by all; but that he was an able and sagacious business man is not disputed by any one. He loved his land, and his sole ambition seems to have been to increase his acres. He saw little of his kin beyond the Clay nephews, who were near neighbors, and seemed not to wish to be upon intimate terms with many people.

It is contended, however, that his nephew, A. A. Clay, had a great influence over him, and used it unduly to the exclusion of the children of Milton Anderson from the benefits of the will. As before stated, Milton Anderson had died in 1863, leaving a widow and two young daughters. In 1870 Milton Anderson's widow and chil-

dren moved to the adjoining county of Bourbon, and they never saw their uncle again during the 39 years of his subsequent life. The claim is made by the contestants that Albert A. Clay had, between the time when the first will was made in 1892, and the making of the second will in 1902, instilled into the mind of his uncle the belief, wholly without foundation, that the children of Milton Anderson were illegitimate, and that for that reason he excluded them from the benefits of his will.

We have examined the record carefully, with a view of stating all the evidence bearing upon this charge that Albert A. Clay exerted an undue influence over the mind of his uncle in the making of his will. In the first place, it is to be noted that Albert A. Clay had nothing whatever to do with the drawing of the will which made him an executor and placed him and his brother Julian and their families upon precisely the same footing as the other devisees.

For the purpose of showing an intention and willingness upon the part of the testator to include the now excluded children of his brother Milton among the beneficiaries of his will, Mrs. Rye states that when she saw her uncle for the last time in 1870, she was quite young, and that he took her upon his knee and said, "If you grow up to be a nice young woman, Uncle Alex will do something for you some day." Mrs. Crump, referring to the same occasion, testifies that he said, "You be good little children, and grow up nice girls, and Uncle Alex will leave you something when he dies." Their mother corroborates them in these statements.

Mrs. Custis A. Smith, a niece, then about 14 years of age, sojourned with the testator from September, 1894, to March, 1895, during which time, according to her testimony, she frequently conversed with her uncle upon the subject of his will and the children of Milton Anderson. She says he frequently spoke of them, and exhibited a sympathetic feeling toward them; he seemed to have a great deal of love for them, and always spoke of them in connection with the making of his will. He further told Mrs. Smith that he expected to leave all his nieces an equal share of his estate, because it was harder for girls to get along in the world, than men. She says he further told her that he had given "Ab." Clay all that he intended to give him; and when she asked him what that was, he said he had given him a half interest in the store which they owned as partners. She further

says that she never saw her uncle Alex and Ab. Clay together in her life, and never heard them in conversation.

While it is quite unusual for an old man to talk business of this character with a girl only 14 years of age and who stood in no close relation of confidence to him, we will take this testimony at its face value. Mrs. Smith only lived at the house temporarily, and for the short period of six months, preliminary to her removing permanently to California.

Mrs. Anderson, the testator's widow, says her husband thought a great deal of Mr. Clay, and would frequently ask his advice on business matters. On one occasion he complained that Mr. Clay, who was his partner in the store, had unwisely incurred a partnership debt which worried Mr. Anderson a good deal. Mrs. Anderson never had any conversation with her husband as to why he omitted the Milton Anderson children from his will, but she says she once heard him talk with English Anderson upon that subject, when English said, "Uncle Alex, you ought not to have left out Uncle Milton's children in your will;" to which Mr. Anderson replied, "Well, they have never been about me any, and I know nothing of them; and Albert said I would not have to put them in." She again says that Mr. Anderson thought well of Mr. Clay; that he had raised him; and that while Mr. Clay was sometimes contrary with him, he did not want to turn against him while they were in business together. She further says that once or twice he said that Mr. Clay had not treated him right; that they had quarreled a time or two about business; and on another occasion when Mr. Anderson wanted to buy the West Bend property, he said Mr. Clay went to the sale and run it up on him and made him pay more for the land than he would have done, and that he did not like that in Mr. Clay. Mrs. Anderson further testifies that when, upon a later occasion, a contract was being drawn, whereby Mr. Clay was arranging to rent the Anderson land, Mr. Anderson sent for English Anderson to advise with him about the contract. On several other occasions he advised with English Anderson upon business matters.

Holt Everman, a brother of Mrs. Anderson, testifies that on one occasion Mr. Anderson said he wanted English Anderson to take his business and handle it for him; that he was afraid that Mr. Clay would do him some injury in some way; that he was going to put Mr. Carroll



Chenault in as an executor; that he wanted Carroll and English in as executors so that they could watch Albert, and that Albert would smuggle the estate if he could. Everman further testifies that Mr. Anderson said he hadn't provided in his will for some of his people as he should have done; that Albert thought they had not been about him any, and could not get anything, or something to that effect. He further testifies that Mr. Anderson once said there were some changes he would like to make in his will, but that Capt. Hathaway, the lawyer who had drawn the will, had advised him not to make any changes at his age—that Capt. Hathaway would not let him make the changes on account of his age. Everman has a claim against the Anderson estate for services in going to Mt. Sterling and getting whiskey for Anderson, at two dollars a trip, and for shaving him forty-five times at fifty cents a shave. The executors are contesting the claim.

S. F. Barnett, who has a suit pending against the Anderson estate for services, testifies that the testator had said upon one occasion that "Mr. Clay was the cause of the coolness of the Anderson heirs coming to see him, because he was jealous of them;" that he wanted to change his will, and that he was afraid that Mr. Clay was going to try to rob the other heirs.

The only remaining witness is English Anderson, the great nephew of the testator, who testifies quite at length concerning conversations with his uncle, the testator. He says his uncle told him that "Ab." had spent a great deal of money, and that he did not understand how he had done it. This worried the testator a great deal, and he was very much provoked about it, just as any man would be on suddenly hearing about something coming up that he did not know about. Referring to the will, he says his uncle told him, in their first conversation upon that subject, that he had been made an executor of the will; and continued saying, "He told me that he had divided his property up into four parts. He said that he had left me and Albert just the same, and made us his executors, and asked me what I thought about it, and I told him I thought it was a very good thing."

English Anderson reports a subsequent conversation as follows: "The next time he talked with me, he said he had cut Uncle Milton's children out of the will. I asked him why? 'Well,' he said 'I haven't seen them since they were little things,' and he didn't seem to think

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a great deal of his brother Milt. He said, 'Ab. says that they can't do anything.' I said, 'Uncle Alex, they are sure to attack your will.' He says, 'Ab. says they can't do anything to it.' "

English Anderson further says that he always told his uncle that he thought the Milton Anderson children should be included in the will, because he felt they would cause the executors trouble if they were omitted. He says the anticipated trouble was the principal reason for the advice he gave his uncle. English Anderson further testifies that his uncle, after he had advised him to change his will so as to include Milton Anderson's children as devisees, said, he wanted to change his will but he was so old he was afraid to do so. He did not say anything about Albert Clay in that connection.

Finally, English Anderson closes his testimony upon this subject, as follows:

"Q. Were you here in town the day the will was probated? A. Yes sir. Q. Did you see Mr. Albert Clay that day? A. Yes, sir. Q. Did you talk to him about the will? A. Yes sir. Q. Did he say anything to you with reference to the matter of leaving out Milton Anderson's children? A. Yes sir, when we first read it, I asked; 'Cousin Ab. why do you reckon he cut Uncle Milton's children out?' He said, 'Why, he did not believe they were his children. 'Q. Did you say anything more to Mr. Clay about it then? A. Well, it was a surprise to me. Q. What did you say to him? A. I didn't say anything just at that time that I remember of. I never dreamed of such a thing. Q. Had you ever heard that mentioned in any the family connection? A. Had not. Q. In the family history at that time? A. Did not. Q. Now, Mr. Anderson, did any of these other devisees, Mr. Chenault, the executor, or any of the devisees in Montgomery County or out West, make a habit of visiting him? A. No sir, my father and grandfather both advised me not to go to see him. Q. Why? A. They didn't like him. Q. Was there a friendly relation existing between him and the rest of his family? A. Well, he was selfish and was close. I don't think any of them thought very much of him. Q. Did any of them visit him, so far as you know? A. I don't think so. I think, may be, Uncle Jo's widow has been down to see him, or something of that kind."

But, in an earlier stage of his testimony, English Anderson had testified as follows:

"A. When the will was read, I wasn't very much pleased with it, and thought at the time, may be, I wouldn't qualify as executor. Me and Ab. Clay talked about it at the time. He would not. He said that he had claims against it. And I had heard Uncle Alex talk a great deal, and I thought possibly—"Q. Tell what was said. Did you tell them what your wishes were about this matter? A. About being cut out of the will? Q. Yes. A. Yes, sir. Q. Did you say to them whether they ought to resist the will? A. I told everybody, from Uncle Alex himself clear down. I had heard my father and my grandfather talk about this, and I never questioned but what they were Milton Anderson's children, and there's none in my mind now, either, gentlemen."

Without undertaking to reconcile these statements as to what English Anderson knew concerning the history of his Uncle Milton's family, it is but reasonable to conclude therefrom that the paternity of Milton's children had been discussed in the family generally.

This is all the testimony bearing upon the subject of undue influence; and in our opinion it amounts to nothing. Taking the testimony as true, it only shows that while the testator was friendly to Albert A. Clay and his family by reason of their long intimate business relations, he did not rely upon his advice or judgment any more, and perhaps not as much as he relied upon the judgment of English Anderson.

Furthermore, according to the testimony of some of the witnesses, the testator was suspicious of Albert Clay, and, if that were true, he certainly was not influenced by him. When the testator came to lease his land to Albert Clay, he called in English Anderson as his advisor. There is no evidence whatever even tending to establish the claim of contestants that Albert Clay had influenced his uncle to omit the Milton Anderson children from his will. Mere suspicions and opinions are not evidence.

In *Childer's Exr. v. Cartwright*, 139 Ky., 505, we laid down the following rule as to the character of evidence necessary to establish undue influence in the execution of a will:

"The rule is well settled that, after due execution is proved by the propounders, the burden of showing that the instrument is invalid because procured by the exercise of undue influence is upon the contestants. This must be shown by evidence at least tending to establish that undue influence was exercised upon the testator. It

is not sufficient that it be shown that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised; some evidence must be adduced showing that such influence was exercised. The law permits the owner of property, who is of sound mind and disposing memory, to transmit his property by last will and testament in such manner as pleases him, and juries are not permitted to make for him a will that accords with their ideas of justice and propriety; nor are they permitted to suspect away the right of the testator to dispose of his property in accordance with his own will and desire."

And, in *Raison v. Raison*, Exr., 148 Ky., 120, we further said:

"It is admissible to show the mental condition of the testator at the time the will is made and his susceptibility to influence by which he was surrounded at the time; but it must be accompanied by some other evidence that the will was executed as the result of undue influence, before the case will be permitted to go to the jury."

*Clark v. Young's Exr.*, 146 Ky., 377, is similar to the case at bar, in the fact that the evidence was there held insufficient to take the case to the jury, and a peremptory instruction was given directing the establishment of the will. Moreover, an examination of the testimony as outlined in the opinion in that case will show that there was perhaps more evidence there tending to show undue influence, than there is in the case at bar. Nevertheless, in sustaining the peremptory instruction in that case, we said:

"That a father may think it best to transfer a feeble-minded child from one institution not specially provided with facilities for instructing the child to another created and maintained by the State for educating children so afflicted, is not in our opinion evidence of undue influence on the part of the person who suggests the propriety of such action. Nor can a father be said to be the subject of undue influence for yielding to the suggestion that his young daughter be kept at home and instructed in music by a teacher in a large city like Louisville in preference to sending her to Cincinnati for that purpose. Here then we have a case predicated on opinions based either on the inequality of the will, or the two circumstances above referred to. As neither the inequality of the will nor the circumstances referred to are sufficient to show undue influence or mental incapacity, it follows

that opinions based thereon are likewise insufficient for that purpose. (Smith v. Commonwealth, 129 Ky., 433; Sanders v. Blakely, 21 Ky. L. R., 1321; Bush v. Lisle, 89 Ky., 393). Nor does this conclusion conflict with the scintilla rule, for that rule requires some evidence even though it be slight; and by evidence is meant something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of proof, or having fitness to induce conviction. (Minnehan v. Grand Trunk, 138 Fed., 37.)"

Under the rule above announced, there was not sufficient testimony to carry the case to the jury, and the circuit judge properly so ruled.

Judgment affirmed.

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### Martin v. Bates, et al.

(Decided May 30, 1913.)

#### Appeal from Letcher Circuit Court.

**Appeal—Dismissal of—Failure to Place Old Record With New Record.**—Where there is nothing before the court by which it may be determined whether the judgment appealed from is a compliance with the mandate following a reversal on a former appeal, and rule 7 of the court not having been complied with, the appeal will be dismissed. (For former opinion, see 124 S. W., 873).

R. O. BRASHEARS for appellant.

R. MONROE FIELDS and DISHMAN, TINSLEY & DISHMAN for appellees.

OPINION OF THE COURT BY JUDGE TURNER—Dismissing the Appeal.

This case has heretofore been in this court under the style of Martin v. Bently, et al., and the opinion will be found in 124 S. W. Rep., 873.

The court reversed the judgment and directed the entering of a judgment quieting Martin's title "to the land in controversy."

Upon the return of the case the court entered a judgment quieting Martin's title to a certain described tract of land which the appellant claims does not embrace the land "in controversy," or at least all of it. But this

record does not contain any of the pleadings or exhibits showing what land was "in controversy" on the former appeal, embracing only the orders and judgment entered since the return of the case to the circuit court. The record on the former appeal is not a part of, and has not been placed with the record on this appeal.

Printed rule seven of this court is as follows:

"When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this court is made part of a record in another case, and not copied into the transcript, the attorney for the appellant must see to it, on pain of having the appeal dismissed, that such old record is placed with the new record before the cause is submitted."

There being nothing before us by which we may determine whether the judgment last entered in the circuit court is a compliance with the mandate of this court, and the above rule not having been complied with, we have no alternative except to dismiss the appeal, and it is so ordered.

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### **Illinois Central Railroad Co. v. J. J. Rice, Judge.**

(Decided May 30, 1913.)

#### **Appeal from Muhlenberg Circuit Court.**

1. Writs—Writs Court of Appeals May Issue.—Under section 110 of the Constitution, the Court of Appeals has power to issue such writs as may be necessary to prevent a miscarriage of justice in extraordinary cases where there is no other adequate remedy.
2. Writs—Cases in Which Court of Appeals Will Issue Temporary Writ.—The court will issue a temporary writ in such cases where this is necessary in order that an appeal prayed and granted, may not be abortive, there being no other remedy.

TAYLOR & EAVES, TRABUE, DOOLAN & COX, BROWDER & BROWDER, BLEWETT LEE and R. V. FLETCHER for plaintiff.

WALKER WILKINS, MILTON CLARK, C. A. DENNY, T. O. JONES for respondent.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Granting writ to stay court of inferior jurisdiction.

Section 110 of the Constitution, prescribing the powers of this court, provides:

“Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions.”

Under this provision it has been held that where there is no other adequate remedy, an appropriate writ may be issued by this court to prevent injustice being done in an inferior jurisdiction. In *Rush v. Denhardt*, 138 Ky., 248, after pointing out that the above constitutional provision gives the court a large discretion, and that this would not be exercised ordinarily to stay a court of inferior jurisdiction from hearing a case in which no appeal could be taken, the court said:

“But we have the power, whenever justice and the right of the matter seem to demand it, to interfere in behalf of a petitioner who has no adequate remedy or means of obtaining relief except to invoke the extraordinary power conferred on this court by the Constitution. And a case might present itself in which the ends of justice would require us to issue the writ to restrain an inferior jurisdiction from doing an act or rendering a judgment that the complaining party in the ordinary course of judicial procedure would have no relief against. As courts are established to administer justice, why should not the highest court in the State, when there is no other adequate remedy, in the exercise of the ample and unquestioned power conferred upon it, lay its superintending hand upon any inferior jurisdiction that is about to commit a judicial wrong and compel it to administer justice according to the right of the case?”

This application by the Illinois Central Railroad Company against J. J. Rice as judge of the Muhlenberg Quarterly Court, is based upon a petition which sets out in brief the following facts: After the decision of this court in *Illinois Central Railroad Co. v. River & Rail Coal Co.*, 150 Ky., 489, the miners in Muhlenberg County, numbering in all about 1,600, conceiving that they were entitled to maintain actions for the damages sustained by them from the failure of the railroad company to furnish cars to the mine operators who employed them, held a number of meetings, the result of which was the determination that the miners should severally file in the Muhlenberg Quarterly court a suit for damages in the sum of \$25, the amount of damage being fixed at that sum so that no appeal could be prosecuted from the judg-

ment of the court. After forty-one suits had been filed all upon a printed form, the railroad company began in the Muhlenberg Circuit Court a suit in equity setting up that a common question was involved in all the actions and asking that to prevent a multiplicity of suits the circuit court enjoin the prosecution by the miners of the several actions in the quarterly court and require them all to set up their claims in one action. The circuit court on a hearing of that case refused to grant the injunction and sustained a demurrer to the plaintiff's petition. The plaintiff declined to plead further, and its petition being dismissed, prayed an appeal to this court, which was granted. Thereupon the railroad company filed in this court its petition setting up the above facts and praying that this court issue its writ requiring the judge of the quarterly court to proceed no further in the cases before him, and has entered a motion that the court issue a temporary writ restraining the defendant until the merits may be heard. The case has been submitted on this motion. It is charged in the petition among other things that if no relief is granted 1,600 suits will be filed and judgments entered and that the quarterly court judge is a candidate for re-election, and that the defendants expect and intend to impose upon him to induce him to render a judgment in each of the cases from which no appeal may be taken, and that the applicant will be left without remedy.

We do not deem it proper at this stage of the proceeding to pass upon the merits of the controversy or to intimate any opinion thereon; but it is manifest that if the quarterly court judge is allowed to go on and try out the cases that are now before him, and this court should on the appeal of the injunction suit above referred to, reverse the judgment in that case and hold that the plaintiff was entitled to the relief sought, or any part of it, the reversal would come too late to affect in any way the plaintiffs in the cases referred to. It is estimated that the judgments in all the cases brought and about to be brought would aggregate \$50,000, and it seems to us that an extraordinary situation is here presented requiring the interposition of this court. On the other hand, the merits of the controversy should not be determined in this proceeding against the quarterly court judge, and should only be determined in the equity case in which the real parties in interest are before the court. The quarterly court judge has done no wrong. He has done noth-



ing more than it was his duty to do, and will be liable to no cost in this proceeding. But that justice may be done, and the rights of the parties intelligently determined, a preliminary writ will issue restraining the quarterly court judge from further proceeding in the cases before him until the appeal in the equity suit above referred to, may be heard and determined, provided the transcript for that appeal is filed with the clerk of this court within sixty days from the making of this order and the appeal is duly prosecuted. This application will be set for hearing with that case at the September term of the court, and will then be finally disposed of.

The motion for the preliminary writ as above indicated is granted.

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### Miller v. Commonwealth.

(Decided May 30 1913.)

#### Appeal from Casey Circuit Court.

1. **Evidence—Criminal Law—Seduction.**—Where a man indicted for seduction under section 1214 of the Kentucky Statutes, marries the prosecuting witness and the prosecution is thereby suspended, but is subsequently renewed after he had deserted his wife, she is a competent witness against him by virtue of the terms of the statute which provides that upon his abandonment of his wife the prosecution "shall be renewed and proceed as though no marriage had taken place."
2. **Criminal Law—Seduction—Subsequent Marriage.**—Where a person charged with seduction under section 1214 of the Kentucky Statutes, marries the prosecuting witness and thereby suspends the prosecution, which is subsequently renewed upon his desertion of his wife, the offense remains as it was in the beginning—the seduction of an infant female under the promise of marriage, and two courses of procedure are open to the Commonwealth. One is to continue the indictment on the docket for three years, or to file it away with leave to re-docket upon notice; the other is to dismiss it, and if within three years after the marriage, cause arises for resuming the prosecution, such as abandonment, to re-indict the defendant.
3. **Criminal Law—Indeterminate Sentence Law.**—The indeterminate sentence law applies only where the crime charged is committed after said law became effective.
4. **Appeal—Striking Briefs From Record.**—Where the brief of a party to the appeal is not accompanied by a classification of the questions discussed, with the authorities relied on to sustain

them, as is required by section 3 of Rule 3 of this court, it will be stricken from the record.

C. F. MONTGOMERY for appellant.

JAMES GARNETT, Attorney General and OVERTON S. HOGAN, Assistant Attorney General for appellee.

OPINION OF THE COURT BY JUDGE MILLER—Affirming.

The indictment charged appellant with having seduced a female under twenty-one years of age. Section 1214 of the Kentucky Statutes, reads as follows:

“Whoever shall, under promise of marriage, seduce and have carnal knowledge of any female under twenty-one years of age, shall be guilty of a felony and, upon conviction therefor, shall be confined in the penitentiary not less than one year nor more than five years. No prosecution shall be instituted where the person charged shall have married the girl seduced, or offer and be willing to marry her, unless he shall willfully and without such cause as constitutes a statute ground of divorce to the husband, abandon or desert her within three years after the date of the marriage, and any prosecution instituted shall, upon the request of the defendant, be suspended if the party accused marry the girl seduced before final judgment; but the prosecution shall be renewed and proceed as though no marriage had taken place if the accused shall willfully and without such cause as constitutes a statutory ground of divorce to the husband abandon or desert his wife within three years after the marriage. All prosecutions under this section shall be instituted within four years after the commission of the offense.”

At the time of the alleged seduction, early in the year 1910, the prosecuting witness, Lillie May Thomas, was about seventeen years of age, and appellant had been paying her attention for two or three years. Their relations continued until about May, 1911, when it became apparent that the prosecuting witness was pregnant; and her father, after learning of her condition, caused a warrant to be issued for appellant. He, however, was not arrested under the warrant; but hearing of it he left the State and did not return until December of that year.

While he was out of the State this indictment was returned, and a child was born to the prosecuting witness. Immediately upon his return in December, 1911, he mar-

ried the prosecuting witness, took her and the child with him, to his mother's home, where they remained until January 29, 1912, at which time the wife left, taking her infant with her, and claiming she was compelled to do so by reason of the bad treatment she had received.

So far as the record shows, the indictment was not filed away by the circuit court after the marriage, but remained on the docket; and upon the separation in January, 1912, the prosecution of the case was renewed.

Upon his trial appellant was found guilty and sentenced to four years imprisonment. He appeals. After the separation there was no amendment of, or change in the indictment, but it continued to be merely an indictment charging appellant with the crime of seduction.

The wife was permitted to testify as to the treatment she received from her husband during their marriage, and it is urgently insisted for appellant that under the provision of section 606 of the Civil Code, which provides that "neither a husband nor his wife shall testify while the marriage exists, or afterwards concerning any communication between them during marriage, nor shall either of them testify against the other," the wife was not a competent witness.

But the provision of section 1214, quoted above, which expressly provides that where the accused in such cases marries the prosecuting witness and willfully abandons her within three years, the prosecution shall be renewed "and proceed as though no marriage had taken place," must be treated as a repeal of section 606 of the Civil Code in so far as it applies to cases of this character.

It was plainly the legislative purpose not only to make the wife a competent witness as to the acts constituting the offense before marriage, but as to all acts of the husband within three years after marriage, which might constitute or be evidence of willful desertion or abandonment. The provisions of the section embracing this feature were enacted in an amendment of 1906, and became necessary by reason of a reprehensible practice which had grown up in this class of cases under the old statute, whereby the accused was offered an easy avenue of escape from the consequences of his conduct by going through the form of a marriage with the prosecuting witness, and immediately abandoning her. Looking to the evil intended to be corrected by the amendment it cannot be doubted that it was intended to repeal section 606 of

the Code in so far as it applied to these cases. There was no other way of reaching the evil.

It is insisted, however, that because there was no allegation in the indictment that appellant had deserted his wife within three years after the marriage, a peremptory instruction to find him not guilty should have been given. This claim is based upon the idea that where there is a renewed prosecution under section 1214 after the marriage and desertion, the prosecution is for a new offense separate and distinct from the original seduction, and must, therefore, be set out in the indictment as required by section 122 of the Criminal Code. This view would require a new indictment. It is, however, based upon a misconception of the statute which merely provides in such cases for the suspension of the prosecution if the accused marries the girl before final judgment, and that "the prosecution shall be renewed and proceed as though no marriage had taken place," upon his desertion of her within three years. This plainly refers to the original indictment and prosecution for seduction, which have been merely suspended by the marriage. In other words, the statute does not make the desertion a separate offense, but evidently intended that the original offense might be taken up and prosecuted to judgment if the desertion occurred, without cause, and within three years.

This statute was upheld throughout in *Commonwealth v. McNutt*, 133 Ky., 702, where McNutt was indicted for seduction after the marriage and subsequent abandonment.

And, in the later case of *Commonwealth v. Tobin*, 140 Ky., 265, we pointed out the true nature of the offense to be seduction and not abandonment, saying:

"The offense is yet, as it was in the beginning, the seduction of an infant female under promise of marriage. Allowing the accused to marry her is reparation only in event that he abides with her three years (unless ground for divorce mentioned should arise). The period of limitation for prosecution under the statute is now raised to four years, so as to give the prosecution a means of enforcing the criminal statute against the seducer should he within that time bring himself again subject to its provisions. It was, therefore, held in McNutt's case that the marriage of the accused and the girl did not alone satisfy the statute; that he must maintain the relation for the required time, or be subject to pun-

ishment as if he had not married her at all. The indictment in McNutt's case was for seduction."

And as to the procedure, we further said:

"It is suggested that the indictment in the case at bar shows on its face that the accused had been indicted before his marriage with Miss Berry, and it is now stated that as that indictment was presumably dismissed, the judgment is a bar to further prosecution. Not so. Two courses are open to the Commonwealth in prosecutions for seduction when the accused marries the girl seduced. One is to continue the indictment on the docket for three years, or to file it away with leave to re-docket upon notice; the other is to dismiss it, and if within three years of the marriage, cause arises for resuming the prosecution, such as the abandonment here charged, to re-indict the defendant in substance as was done in the McNutt case."

As the seduction was committed in February, 1910, and prior to the enactment of the indeterminate sentence law of 1910, the court properly left the fixing of the penalty to the jury, under the law then in force. The indeterminate sentence law became effective in June, 1910, and applies only where the crime charged is committed after that time. *Stewart v. Commonwealth*, 141 Ky., 522; *Dial v. Commonwealth*, 142 Ky., 32.

Appellant's contention that his motion for a peremptory instruction should have been sustained, is without merit, whether it be treated as based upon the alleged insufficiency of the evidence, or the interpretation claimed for the statute. There was ample evidence to carry the case to the jury, under our construction of the statute.

The court gave the following instructions:

"1. If you believe from the evidence beyond a reasonable doubt that the defendant in this county, and before the finding of the indictment, did, under a promise of marriage, seduce and have carnal knowledge of Lillie May Thomas, who was then a female under the age of twenty one years, and if you further believe from this evidence beyond a reasonable doubt that the defendant, within three years after his marriage with Lillie May Thomas, willfully deserted and abandoned her, you will find defendant guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary at not less than one nor more than five years.

"2. If you have a reasonable doubt of defendant having been proved guilty, you will find him not guilty.

"3. The refusal of the defendant, after marrying the witness, Lillie May Thomas, to recognize and treat her as his wife, or the treatment of her in such cruel and inhuman manner as to destroy permanently her peace and happiness, or such treatment as to show an aversion to her on the part of the husband, constitutes an abandonment as used in these instructions, and if you believe from the evidence beyond a reasonable doubt, that the defendant so recognized and treated the said Lillie May Thomas, as set out in this instruction, No. 3, after he married her, you will be authorized to find such treatment, desertion and abandonment as contemplated by the law.

"4. If the jury believe from the evidence that the defendant, Tom Miller, in good faith married the prosecuting witness, Lillie May Miller, and attempted to live with her and treat her as his wife, and she by her own conduct prevented him from doing so, they will find defendant not guilty."

Appellant complains that the first instruction was prejudicial to his rights because it failed to incorporate therein the provision of the statute which would excuse his abandonment of his wife if he had such cause as constituted a statutory ground of divorce. But as there was no evidence that appellant had any such defense, the court properly omitted the qualifying phrase, "and without such cause as constitutes a statutory ground of divorce to the husband."

It is further complained that the third instruction defining "abandonment" is erroneous. The evidence was, however, amply sufficient to warrant the third instruction, and its phraseology is not objectionable.

The appellant offered no instructions, and those given by the court fairly presented the issues to the jury, and are not subject to any substantial criticism.

The briefs of both parties are stricken from the record, because neither brief is accompanied by a classification of the questions discussed, with the authorities relied on to sustain them, as is required by section 3 of rule 3 of this court.

Judgment affirmed.

**Graves' Administrator v. City of Georgetown.**

(Decided June 3, 1913.)

**Appeal from Scott Circuit Court.**

1. **Taxation—Residence of One for Taxation.**—A man's residence for taxation is where he really resides, and a verdict finding his residence where he spent most of his time will not be disturbed, although he declared that his residence was elsewhere.
2. **Taxation—Listing Omitted Property—Appointment of Supervisors by Council—Vote of Council.**—In listing omitted property for taxation under section 3542 Ky. Stats., the vote of the council need not be taken by yeas and nays and recorded in the journal.
3. **Estates—Demand Against Estate of Decedent—Verification.**—Every demand against the estate of a decedent must be verified by the affidavit of the claimant showing its justness and no judgment can be entered until such affidavit is filed. But this does not affect the verdict and on a return of the case a judgment may be entered upon the verdict after the proper affidavit is filed.

ROBT. B. FRANKLIN ROBT. C. TALBOTT for appellant.

B. M. LEE for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—**  
**Reversing.**

The city of Georgetown brought this suit against George T. Graves to recover of him taxes on his personal property for the years 1905-6-7-8 and 9. He filed an answer in which he denied that he was a resident of Georgetown, and after this he died during the pendency of the action. After his death the city filed an amended petition for the purpose of reviving the action; also to recover the taxes for the year 1910. On a trial of the case before a jury, there was a verdict and judgment for the city for the taxes for the years 1908-9 and 10, its petition being dismissed as to the taxes for the years 1905-6 and 7. The defendant appeals.

The proof on the trial showed that George T. Graves was a bachelor owning about \$60,000 in personalty. He had lived all his life in Scott County outside of the city of Georgetown on a farm that he owned up to about the year 1904, when he sold the farm and after this he spent most of his time boarding at some hotel in Georgetown. After he had sold the farm, he occupied a room in the house and always kept some of his clothing and other

personal property there. He claimed that as his home, and always voted in that precinct. His niece to whom he had sold the farm, invited him to remain there with her. But he had no right of residence there, and only remained there at the invitation of his niece when he was there. He spent a good deal of his time visiting in different parts of the United States, but there was evidence on behalf of the city that his real home was in Georgetown after he sold his farm sufficient to take the case to the jury, and on all the proof we cannot say that the verdict of the jury is against the evidence. Residence is a question of fact and while we are satisfied that the decedent always intended that his home should be considered at the farm, he no doubt was actuated largely by the motive of escaping city taxation, and we do not see that the jury erred in finding that his real home at least during the years 1908-9 and 10 was in Georgetown.

While section 3489, Kentucky Statutes, applying to cities of the fourth class, provides that no ordinance for the assessment of any tax shall be valid unless the yeas and nays thereon be recorded in the journal of proceedings, this provision applies only to ordinances levying a tax. It does not apply to ministerial action taken by the council in making an assessment of property subject to taxation which has not been listed as provided, in section 3542. The council may list omitted property by an order entered upon their record without passing an ordinance.

The instructions of the court to the jury aptly and clearly presented the law of the case and placed the burden of proof on the city as they were told that they could find for the city if they believed from the evidence that the deceased was a resident of the city and had his domicile there. The court also gave the jury on the motion of the defendant, this instruction:

"The court instructs the jury that it is a maxim of the law that every person must have a domicile or home and also that he can have but one and that when once established it continues until he renounces it and takes up another in its stead, and that a home or domicile is not lost by temporary absence, and where one has had an actual home or domicile and departs from it temporarily intending to return, it will remain his legal home or domicile for all purposes."

The jury could not have misunderstood the law of the case.



We find, however, one error in the record. Section 3870, Kentucky Statutes, requires all demands against the estate of a decedent to be verified by the affidavit of the claimant stating certain facts.

Section 3872 provides:

“Before such affidavit is made no action shall be brought or recovery had on any such demand.”

A tax claim against a decedent's estate must be verified as other claims. (*Gay v. City of Louisville*, 93 Ky., 349). It is error to render a judgment upon a claim before it is verified. (*Worthley v. Hammon*, 13 Bush, 510, *Usher v. Flood*, 12 R., 721). A contrary rule was not laid down in *Spradlin v. Stanley*, 124 Ky., 704. That case turned upon the fact that the objection had been waived in the circuit court by the appellant failing to make it at the proper time when he was called upon to make any objections that he had. But that principle does not apply here.

The judgment is reversed and the case is remanded with directions to set aside the judgment and re-enter it upon the necessary affidavit being filed.

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### Beckett v. Commonwealth.

(Decided June 3, 1913.)

#### Appeal from Lewis Circuit Court.

**BILL of Exceptions—When to be Filed—Cannot Be Filed in Vacation.**

—A bill of exceptions must be filed during the term at which the motion for new trial is overruled, unless time is given to a day in the next term for filing it. It cannot be filed in vacation; and it cannot be filed at the next term unless an order extending the time to that term has been made.

ALLAN D. COLE for appellant.

JAMES GARNETT, Attorney General, OVERTON S. HOGAN, Assistant Attorney General for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

Alva Beckett was indicted in the Lewis Circuit Court under section 1201b for the offense of appropriating to his own use property in possession of a common carrier for transportation. Upon a trial of the case he was

found guilty and his punishment fixed at confinement in the penitentiary from one to five years. On March 7, 1913, his motion for new trial was overruled; to which he excepted and prayed an appeal to this court which was granted. The order concludes with these words:

"And on his motion the judgment is suspended for sixty days from this date to permit defendant to prepare and file his bill of exceptions: on his further motion it is ordered that the official stenographer, Priscilla W. Parker and the clerk of this court within sixty days prepare a complete transcript of the record for the Court of Appeals."

No further action was taken in the case at that term of the court but at the next term of the court and on May 12, 1913, he produced in court a bill of exceptions which was signed by the judge, approved and made a part of the record, the judge certifying that the bill of exceptions was not produced to him nor seen by him nor in any wise called to his attention until that day; that it was filed by the stenographer with the clerk of the court on March 21, 1913, when he was holding court in another county, from which he did not return until April 12, 1913, and that he ordered the bill made a part of the record so far as he had the right then so to do. The Commonwealth has entered a motion to strike the bill of exceptions from the files and this is the first question to be determined on the appeal.

Section 282 of the Criminal Code provides as follows:

"The exception shall be shown upon the record by a bill of exceptions prepared, settled and signed as provided by the Code of Practice in civil cases."

Section 334 of the Civil Code provides:

"Time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the court."

A bill of exception may not be filed in vacation. It must be filed in court either during the term at which the motion for new trial is overruled or time must be given to prepare a bill of exceptions not beyond a day in the succeeding term to be fixed by the court. If the order of the court made on March 7th may be construed as giving sixty days from that date to prepare a bill of exceptions, this time expired before the bill of exceptions was tendered in court on May 12, and the filing of the bill in the clerk's office by the stenographer was ineffective for any purpose. The motion to strike out the bill of excep-

tions must therefore be sustained. (*Adkins v. Com.*, 102 Ky., 100-107.)

All the matters relied on for reversal occurred on the trial and there being no bill of exceptions in the record, none of them can be considered; but we have read the record and we do not find in it any error substantially to the prejudice of the appellant.

Judgment affirmed.

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## Roberts, et al. v. Calhoun.

(Decided June 3, 1913.)

### Appeal from Pulaski Circuit Court.

1. Boundaries—Location of Corners and Lines—Evidence—Weight and Sufficiency.—Evidence, while not satisfactory, held sufficient to establish location of lost corners and lines.
2. Appeal—Records—Omissions—Presumptions.—Where maps and exhibits, not copied into the record in support of the finding and judgment is persuasive merely, it will be presumed that the finding and judgment is correct.

DENTON & FLIPPIN for appellants.

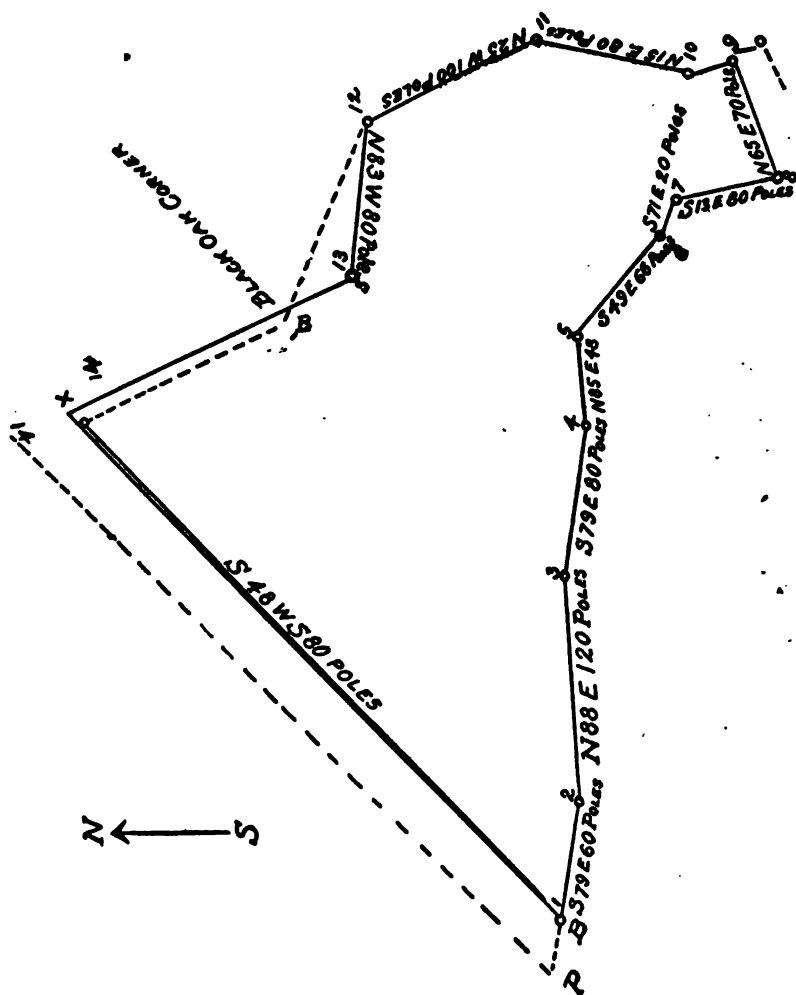
MORROW & MORROW for appellee.

### OPINION OF THE COURT BY JUDGE LASSING—Affirming.

Clarence Roberts and Magola Roberts, infant children of Henry Roberts, deceased, by their guardian, brought suit in the Pulaski Circuit Court against Bluford Calhoun, in which they alleged that they were the owners of a certain described tract of land in said county, upon which the said Calhoun was committing trespass by cutting and removing timber therefrom. They asked that he be enjoined and restrained from so doing. A temporary restraining order was issued. Defendant answered and admitted cutting the timber, but denied that plaintiffs were the owners of the land from which it was cut. Upon this issue, the case was prepared for trial, and upon final submission the chancellor was of opinion that the plaintiffs did not own the land on which the timber in question stood, and he, therefore, dismissed their petition. They appeal.

Appellants' father, Henry Roberts, owned a tract of land along the waters of the Cumberland river near the mouth of Cave Creek and known as the Seminary sur-

vey. The beginning point of said survey is lost, and there is no fixed object marking the second and third corners. The accompanying map shows the location of the timber which was cut, with reference to the claims of appellants and appellee.



If the true boundary line of the Seminary survey is the black line from X to B., the judgment is correct and should be affirmed. On the other hand, if the exterior boundary line of said survey is as shown on the map by the dotted line P.—14, then the timber in controversy stood upon land admittedly owned by appellants.

Hence, the controversy is over the true location of this line separating the lands of appellants from those of appellee.

The deed under which appellants claim calls for the following boundary:

"Beginning at a Sugar tree, thence running S. 79 E. 60 poles to a Dogwood; thence N. 88 E. 120 poles to a poplar; thence S. 79 E. 80 poles to a gum; thence N. 85 E. 48 poles to a dogwood; thence S. 49 E. 66 poles to a black oak; thence S. 71 E. 20 poles to a white oak; thence S. 13 E. 80 poles to an elm; thence N. 65 E. 70 poles to two poplars; thence N. 20 W. 40 poles to an elm; thence N. 15 E. 80 poles to a poplar; thence N. 25 W. 100 poles to a poplar and dogwood; thence N. 83 W. 80 poles to a black oak; thence N. 25 W. 140 poles to a double post oak; thence S. 48 W. 380 poles to the beginning."

The sugar tree at the beginning corner has, according to the testimony of all the witnesses, been gone for many years. While several of the witnesses for appellants have testified, either from personal knowledge or from statements that have been made to them by old citizens who were acquainted with the location of this tree, that it stood at or near the intersection of the dotted lines at "P," approximately the same number of witnesses for appellee have testified that it stood at or near the intersection of the dark black lines at "B." The reasons given by the witnesses for so locating this corner are not only unsubstantial but far from satisfactory. Many of them never saw the tree standing, and testify merely from their memory of what old inhabitants said to them in conversations had from ten to forty years before the date upon which they were testifying. With no other means of enabling them to fix the location of this beginning corner, it is not surprising that they are unable to agree as to its true location. This evidence, when considered as a whole, cannot be said to be of any material aid in determining the true location of this disputed line.

The only evidence in the record of substantial value is that of the surveyor, M. A. Waddle, who recently ran out some of the lines of the Seminary survey in an effort to locate the corner in dispute. He testifies that corners 1, 2 and 3, of said survey were lost, that is, there was nothing at either of these points to show where the corners stood, but that at the fourth point, the gum tree

called for as a corner tree was still standing, and the figures or marks on it showed that it was a corner tree. From the age of the marks on this tree, the witness was able to testify that it was, in fact, the tree called for in the original survey. He started at this gum tree and, by reversing the calls and retracing the lines, established the beginning corners at the intersection of the black lines at the letter "B." He testifies that he reversed the call S. 79 E. 80 poles, and that the line, when so run, brought him near a point where it was claimed the popular tree marking the third corner in the Seminary survey once stood. From that point he reversed the next call, N. 88 E. 120 poles, carrying him back to the second corner of the Seminary survey, and from that point he ran the line, S. 79 E. reversed 60 poles, making the proper allowances for variations, and that brought him to the point designated on the map by the letter "B." He then reversed the call and ran the closing line, which is the line in dispute, and found some marked timber along the black line running from the figure "X" to the figure "1 B." This timber was not exactly on the line but near it, varying from six to ten feet. The marks on these trees showed that they had been there for many years. While this evidence is not at all conclusive, it is persuasive, that the line "X-B," as established by this witness is approximately correct.

The record is not entirely clear as to how the closing lines of the Seminary survey were run in order to establish the point "X," but as the original patent, as well as the deed under which appellants claim, calls for a straight line between the last and first corners, and this line, when run by the witness was found to be near a fairly well defined line of trees bearing marks sufficiently ancient to warrant the inference that they were line trees of the Seminary survey, it is apparent that the point, at which he started to run the closing call of the Seminary survey, must have been approximately correct.

Reference is made by the witness to exhibits and maps which are not copied into the record and which the clerk of the lower court has certified, in response to rule, that he is unable to supply. Just what aid these lost exhibits and maps would be in enabling us to determine the true location of this disputed line, it is impossible to tell, but, as the chancellor had the benefit of this evidence and was doubtless also acquainted with many of the witnesses and thus in a better position to judge of the

weight that should be given their testimony, we feel that this is one of that class of cases where we may, with peculiar propriety, rely upon the judgment of the chancellor. Indeed, while the evidence before us is not satisfactory, the weight thereof supports the finding of the chancellor. The judgment is, therefore, affirmed.

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## **N. T. Conn & Company v. Hammonds & Ogles.**

(Decided June 3, 1913.)

### **Appeal from Simpson Circuit Court.**

**Contracts—Action for Value of Work Done Under Contract for Purchasing Tobacco—Question of Fact—Evidence.**—In an action to recover for services rendered under a contract for purchasing and putting up tobacco the questions were of fact; they were fairly submitted to the jury, and the finding in favor of the plaintiffs will not be disturbed.

• **G. T. FINN** for appellants.

**GEORGE C. HARRIS** for appellees.

### **OPINION OF THE COURT BY JUDGE TURNER—Affirming.**

In the fall of 1911 appellants and appellees entered into a contract by the terms of which appellees were to buy, grade, handle and prize in hogsheads, and put into the cars for shipment for appellants a large quantity of tobacco, the shipments to be made from Petroleum, Kentucky, and Bledsoe, Tennessee, the two places being only a short distance apart. Appellants were to advance the money for the purchase of the tobacco.

Under this contract appellees bought, graded and prized during the season of 1911 and 1912 839,525 pounds. Under the original contract appellees were to receive as compensation fifty cents per one hundred pounds for the first 400,000 pounds so purchased and handled, and forty cents per one hundred pounds for all in excess thereof; but under the terms of the contract first made the tobacco was to be graded by appellees into three grades according to length only.

After appellees had purchased a large part of the tobacco, but when they had graded and prized only four or five hogsheads of it, appellants through one of its mem-

bers directed them in the future to grade the tobacco into six grades according to both length and color, whereupon appellees claiming that this would entail additional labor and expense refused to do so under the existing contract. Up to this point the evidence is uncontroverted. Then appellants offered to pay them fifty cents straight per one hundred pounds for all of the tobacco bought, and appellants claim that they accepted this proposition; but appellees' contention is that they still declined to accept that proposition, and that appellants then said to them to go on and do the work and they would pay them what it was reasonably worth.

This is a suit by appellees for the reasonable value of the work so done by them. Appellants defended setting up the alleged fifty cents contract, and in addition a claim for damages by reason of the alleged failure of appellees to properly handle and bulk the tobacco; their alleged failure to use proper material in the making of the hogsheads; their alleged negligence in receiving tobacco in too high case, and in placing funky tobacco with other tobacco so as to injure the latter.

The jury returned a verdict for appellees based upon a valuation of about fifty-two and one-half (52½) cents per one hundred pounds for the purchase and handling of the tobacco.

A careful reading of the briefs and record discloses nothing to us but two simple questions of fact, to-wit:

- (1) What was the contract between the parties?
- (2) Were appellees negligent in the manner of doing the work?

These questions were fairly submitted to the jury by instructions accurately drawn and clearly expressed, and we see no reason to disturb their verdict.

Judgment affirmed.

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### **Southern Insurance Company, et al. v. Milligan.**

(Decided June 3, 1913.)

Appeal from Butler Circuit Court.

1. Corporations—Subscriptions for Stock—Right of Subscriber to Rescind for Fraud.—Representations made by an agent of a corporation to induce a person to subscribe for stock where they consist merely of expressions of opinion as to the future pros-



pects of the company and the future value of the stock, are not sufficient to authorize a cancellation of subscription for fraud, although the future condition of the corporation does not fulfill the promises of the agent.

2. **Corporations—Subscriptions for Stock—Right to Cancel for False Representations Contained in Papers Issued by Corporation.**—Where a corporation issues public statements concerning its assets and liabilities and on the faith of these statements a person who is induced to subscribe for stock, may obtain a cancellation of his contract if it turns out that the representations contained in the paper were false or misleading in material respects.
3. **Corporations—Subscriptions for Stock—False Statements as to Surplus.**—A statement on a subscription paper that the corporation has a surplus fund in a designated amount, if false, is sufficient to justify a rescission of the contract.
4. **Corporations—Bound by Representations Made by Agent in Obtaining Subscriptions for Stock—Right of Purchaser to Rescind if Representations False.**—An agent of a corporation who solicits subscriptions for stock, speaks for the corporation, and it is bound by all the representations that he makes concerning the stock he has for sale, and if his representations are false in material respects, the purchaser may have a cancellation of his contract.
5. **Corporations—Subscriptions for Stock—Right of Purchaser to Cancellation of Contract.**—The false representations that will authorize a cancellation of stock subscriptions must be in reference to past or present conditions and not be mere expressions of opinion as to what the future prospects of the corporation are.
6. **Corporations—Subscriptions for Stock—Knowledge of Purchaser That Representations of Agent Are Not True—Right to Rely on Representations.**—A person desiring to subscribe for stock, and who is ignorant of the condition of the corporation, may rely on material and reasonable representations made to him by the agent and is not obliged to seek information from other sources or make any effort to verify the truth of the representations made by the agent, but a party who is in possession of information that the representations made by the agent are not true, or who has been put on notice as to their falsity, will not be heard to say that he was induced by the false representations to subscribe for the stock.
7. **Corporations—Subscriptions for Stock—False Representation of Agent as to Other Purchasers and Dividends That Will Be Paid.**—Where a party has been induced to purchase stock upon false representations made by the agent of the corporation that influential and well known citizens had purchased stock, or that the corporation is paying dividends, may have a cancellation of the contract.
8. **Banks.**—Where a bank discounts commercial paper before its maturity in the ordinary course of business, and without notice of any infirmity in the paper, it will not be affected by a fraud

practiced in the execution of the paper or by the fact that the contract between the maker and the payee of the contract has been cancelled for fraud.

9. **Fraud—Action to Set Aside Contract for—Specifications of Petition.**—Where the petition in an action to set aside a contract on the ground of fraud, specifies the particular fraud relied on, the plaintiff will be confined to evidence in support of his specifications.

**W. A. HELM, LOGAN & HAZELIP** for appellant Southern Insurance Company.

**HERDMAN & GARDNER** for appellant Woodbury Deposit Bank.  
**G. V. WILLIS, N. T. HOWARD** for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming in Part and Reversing in Part.**

On September 7, 1911, the appellee, Milligan, subscribed for one hundred shares of the capital stock of the appellant, Southern Insurance Company, and signed two subscription papers, each being for fifty shares of stock and each a duplicate of the other except as to the maturity of the notes given by appellee in payment of the subscription. The subscription paper reads:

“Stock subscribed to the Southern Insurance Co., Nashville, Tenn. Par value of each share, ten dollars. Surplus on each share, twenty dollars. Authorized capital stock, five hundred thousand dollars. I, G. H. Milligan, of Round Hill, Ky., hereby subscribe for fifty shares of the capital stock of the Southern Insurance Co., to be fully paid and non-assessable, for which I agree to pay fifteen hundred dollars, being at the rate of \$30 a share. No certificate of stock shall be issued until the company has received payment in full for the shares herein subscribed for at the prices named herein. No conditions or agreements other than those printed and written herein shall be binding on the company. This subscription is subject to acceptance by the company. Payments to be made; fifteen hundred dollar note to be paid on or before March 7, 1913. Witness A. A. Streit. Date, Sept. 7, 1911.”

The two notes executed by appellee were worded the same except as to the time of payment, each note being for fifteen hundred dollars, one maturing six months after date and the other twelve months after date. A few days after the execution of these notes, they were purchased from the Insurance Company, in the regular

course of business, by the Woodbury Deposit Bank, and soon thereafter there was issued to appellee two certificates of stock in the Insurance Company, each showing that he was the owner of "fifty shares of ten dollars each of the capital stock" of the Insurance Company.

In November, 1911, appellee brought this suit against the Insurance Company and the Woodbury Deposit Bank, tendering to the company the certificates of stock issued and asking that the notes executed by him be canceled, and that the Woodbury Deposit Bank and the Insurance Company be restrained from transferring or disposing of the notes.

This relief was sought upon the ground that A. A. Streit, the agent of the Insurance Company with whom the contract was made, at the time of the transaction falsely and fraudulently represented that the par value of the stock that would be delivered would be three thousand dollars, when in fact the par value of the stock was one thousand dollars; and that the Insurance Company was paying an annual dividend of 27 per cent on the stock, when in fact it had never paid any dividend; and that John M. Carson and others had purchased stock in the company, when in truth Carson had never purchased any stock; and that the value of the stock would double in twelve months; and that the price of the stock would advance and that if he did not buy at once he could not get it later at \$30 a share, when in fact the stock both after and since had been sold by the company at less than \$30, a share.

He further averred that when the contract was entered into he had no information, and no means of obtaining information, except from the agent Streit as to the truth of any of the representations that he made, and that he was induced by these representations to enter into the contract.

For answer to this petition the Insurance Company denied that its agent made any false or fraudulent representations to appellee, or that appellee was induced to enter into the contract by reason of any false representations or statements made by the agent. It further set up that appellee, at the time he subscribed for the stock, was fully advised of the condition of the company and the value of the stock, and there was no fraud or overreaching or misrepresentation practiced in selling the stock to him.

The Woodbury Deposit Bank also filed an answer in which it asserted that it purchased the notes in good faith, for a valuable consideration, before maturity, and asked that it be protected in its purchase.

Upon hearing the case the lower court entered a judgment cancelling the notes and also the certificates of stock, as well as the certificates of deposit issued by the Woodbury Deposit Bank to the Insurance Company. From this judgment the Insurance Company and the bank prosecute this appeal.

No person was present when the sale of the stock to appellee was made except himself and the agent Streit. Appellee testifies that Streit, who was a stranger to him, came with a letter of introduction from his friend, Dr. Cherry. That Streit showed him papers and circulars setting forth the standing of the company, and told him that John M. Carson and others had bought stock, and that the stock would double itself in value in twelve months, and was worth \$30 a share; that the stock was non-assessable and was paying 27 per cent dividend, not on the par value of the stock, but on the investment, and that the company would pay the next dividend in January, 1912; that he bought one-hundred shares and was to pay \$30 per share for it, and was under the impression when he bought the stock that the par value of the stock was \$30 per share, and did not learn that it was only \$10 per share until sometime later; that at the time he bought the stock, he did not have any means or opportunity of learning the value of the stock or the financial condition of the company, or of ascertaining the truth of what Streit told him and relied on the representations made by Streit.

A. A. Streit testified that he was selling stock for the company, and that he told appellee that the company was in a position to pay a dividend the first of January, but did not tell him it would do so; and further told him that the company was on a gross earning basis of 27 per cent on the par value of the stock, and that as near as he could figure from the statements the dividends would be 12 per cent or 15 per cent on the par value, but that the matter of paying dividends was entirely with the board of directors. He further said that he did not tell him that the stock would double in value in twelve months, but did tell him that John M. Carson had taken 25 shares of stock.

John M. Carson testifies that Streit tried to get him to purchase some of the stock, but that he declined to take any of it.

It is also shown by the evidence that the company, although a solvent and going concern when the transaction was had with appellee and when the evidence was taken in May, 1912, had never declared or paid any dividends, and although it had a paid-up capital stock of \$166,450, its surplus fund in 1911 was only \$17,533.13.

It will thus be seen that there is not material difference between the evidence of appellee and Streit as to the representations made by Streit in regard to dividends, and it appears without contradiction that Carson had not purchased any stock in the company and that the company had never paid any dividends.

We may put aside as not controlling the representations made by Streit as to the future prospects of the company and the future value of its stock. These representations fall within the general rule—to which, however, there are some exceptions—that representations made by an agent under circumstances like those shown in this case will be treated as mere expressions of opinion, not having sufficient weight to induce the purchaser to make the investment.

It is also said by counsel for the Insurance Company that any representations made by Streit that the par value of the stock was \$30, or that the stock was worth \$30, should be put aside because they contradict the written contract delivered by Streit to appellee, and which shows on its face that the par value of the stock was only \$10 per share. It is true that the paper designated "subscription for stock" signed by appellee, and which may be treated as the contract between the parties, contained on its face the words "par value of each share, \$10," but immediately under these words are the further words "surplus on each share, \$20." So that, although appellee could not say in contradiction of this paper that he believed the par value of each share was \$30, it is yet apparent that the statement that the surplus on each share was \$20, was calculated to mislead and deceive a purchaser into the belief that the actual value of the shares was in fact \$30, when in truth the actual value was less than \$12, as the surplus was less than \$2 a share in place of \$20.

Corporations that issue public statements concerning their assets and liabilities with the purpose of in-

ducing subscriptions to the capital stock should carefully abstain from making any false or deceptive representations in respect to these material matters. The public generally who invest money in corporate stocks and securities are almost necessarily limited in their information as to the financial condition of the corporation to the papers and circulars that it distributes for the information of the investing public; and while corporations are not ordinarily to be held accountable for expressions of opinion as to the future prosperity of the concern, the defrauded purchaser who subscribes for stock should not be defeated in his efforts to obtain a cancellation of his subscription when it is made to appear that he made the purchase on the faith of the truthfulness of statements published by the corporation showing its then financial condition. *Prewitt v. Trimble*, 92 Ky., 176; *Oil City Land & Improvement Co. v. Porter*, 99 Ky., 254; *Weissinger Tobacco Co. v. Van Buren*, 135 Ky., 759; *Allen v. Neale*, 134 Ky., 690; *Long v. Doughitt*, 142 Ky., 427.

We also think that a statement on a subscription paper that the corporation has a surplus fund in a designated amount is intended to convey to purchasers the idea that the corporation has in fact a bona fide surplus in the amount specified, and this statement would undoubtedly have weighty influence in inducing a contemplated purchaser to subscribe for stock, as he would naturally and reasonably believe that the par value of each share of stock was enhanced in value in the amount specified as surplus. The word "surplus" in the connection it was used on this subscription paper might reasonably and naturally be understood to mean that the corporation had money or property of value equal to the amount designated as surplus and that its capital stock was enhanced in the amount of this sum.

Taking these propositions as a basis it is strongly urged by counsel for appellee that the misleading and deceptive statement as to the surplus on the face of the subscription paper is in itself a sufficient reason for cancelling the contract on the ground that it was obtained by fraud, and we would be inclined to accept this view if the pleadings of appellee were sufficiently broad to justify us in putting the decision on this ground, but as the petition states distinctly the fraudulent representations relied on, and does not include the one mentioned, we must pass it without further notice.

Coming now to the representations made by the agent independent of the writing, we find it virtually admitted that he did represent that the Insurance Company was on a large dividend-paying basis and that John M. Carson had subscribed for stock in the company. The argument is made in behalf of the Insurance Company that these representations of the agent should not be considered as having a controlling influence in inducing appellee to purchase the stock, and, therefore, do not furnish sufficient grounds for a cancellation of the contract. But we do not agree with counsel in this position. There is really no dissent in the authorities that the agent of a corporation to solicit subscriptions speaks for the corporation, and it is bound by all the representations that he makes concerning the stock he has for sale. It is equally well-settled that a person desiring to subscribe for stock, and who is ignorant of the condition of the corporation, may rely on material and apparently reasonable representations made to him by the agent concerning the value of the stock, the solvency of the corporation and other existing matters relating to its business, management and affairs, and is not obliged to seek information from other sources or make any effort to verify the truth of the representations made by the agent.

Another generally accepted rule is that a party will not be heard to say that he was induced by the false representations of an agent to subscribe for stock when he is in the possession of information that the representations made by the agent are not true, or has been put on notice as to their falsity. It is also held, with few exceptions, that the false representations that will authorize a cancellation of stock subscriptions must be in reference to past or present conditions and not be mere expressions of opinions as to what the future prospects of the corporation are. Thompson on Corporations, Vol. 1, Sec. 714-732; Cook on Corporations, Vol. 1, Sec. 136-153, 349-357; German National Bank v. Nagel, 26 Ky. Law Rep., 748; Perkins v. Embry, 24 Ky. Law Rep., 1990; First National Bank of Stanford v. Mattingly, 92 Ky., 650; Southern Development Co. v. Silva, 125 U. S., 247, 31 Law Ed., 678.

Applying now these principles to the facts of this case, we have no difficulty in reaching the conclusion that the agent did make material as well as false representations concerning the value of the stock and the con-

dition of the Insurance Company to appellee, and that the representations exercised a controlling influence in inducing him to buy the stock.

Appellee knew nothing about the condition of the Insurance Company before he met the agent, and the transaction was closed within a few hours after appellee first met and became acquainted with him. During the negotiations that resulted in the purchase of the stock, appellee had no means or opportunity of learning anything about the value of the stock or the condition of the company except from the agent and the papers he furnished nor was there anything connected with the transaction that would put him on notice that the representations made by the agent or contained in the papers were not true. The agent came to him with a letter of introduction from a friend, and all of the representations that he made were reasonable and were of a nature calculated to induce an ordinarily prudent business man to invest in the enterprise. The agent told him, for example, that John M. Carson, who, it appears, was a well-known and good business man in that community, had subscribed for stock.

It is a matter of common knowledge that persons who are approached with propositions relating to the investment of money are frequently influenced to either make or decline the investment by knowledge of what some friend or neighbor or acquaintance, in whose business ability they have confidence, has done in reference to the same character of investment. That agents soliciting subscriptions to stock appreciate the value of being able to tell persons they desire to trade with that this or that influential man in the community has made a like investment, is well illustrated by what took place in this case. Carson testifies that,

"Streit said to me that if I would buy some of his stock, as well as I can remember, as much as \$250 worth, and would use my influence to aid him in disposing of the stock to other persons, that he would allow me one dollar for each share we sold," and that "if it did not suit me to pay for the stock, the company would give me as much time as I would want, and if I was not then ready to pay for it, he would see that the time was extended without troubling me, and that he made that offer as an inducement for me to purchase some stock so that he could use my name with people as having purchased it."



The false statement made by the agent in reference to Carson related to a fact that had passed, and was obviously made for the purpose of inducing appellee to purchase stock, and that it did have large influence in obtaining the subscription, we have no doubt. *Coles v. Kennedy*, 81 Ia., 360; 25 Am. St. Rep., 503.

A further false and material statement relating to an existing fact was made by the agent when he told appellee that the company was paying 27 per cent on the investment, and so closely connected with this as to make it almost a false statement of an existing fact, was the representation that the company would pay a dividend in January, 1912.

It of course needs no argument to demonstrate that an agent proposing to sell stock could not make any representations concerning it that would be more attractive to a prospective purchaser than the statement that it was paying and would pay large dividends, and it is not to be doubted that the representations the agent made to appellee in reference to the dividends this corporation had and would pay had a controlling influence in inducing him to purchase the stock. But passing the representations as to the dividend that the company would pay in January, 1912, the false representation concerning the dividend the company was paying at the time the contract was entered into is sufficient in itself to justify a cancellation of the contract.

On the appeal of the bank the evidence shows that the notes executed by appellee to the Insurance Company were purchased and discounted by the bank before the maturity of the notes, and in the ordinary course of business, without notice on the part of the bank of any infirmity in the notes. It is shown that the bank did not pay the proceeds of the notes to the Insurance Company but retained it as a time deposit, issuing to the Insurance Company certificates of deposit. Under these facts the purchase by the bank of the notes is not affected by the cancellation of the contract between appellee and the Insurance Company, but appellee in the transaction with the bank takes the place of the Insurance Company. In other words, he is entitled to the benefits of the certificates of deposit issued by the bank to it, and so when the certificates of deposit fall due, he will be entitled to receive from the bank the amount of money represented by them.

Wherefore, the judgment on the appeal of the Insurance Company is affirmed, and on the appeal of the bank is reversed, with directions to enter a judgment not inconsistent with this opinion.

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### **Louisville & Nashville Railroad Company v. Lee.**

(Decided June 3, 1913.)

#### **Appeal from Ohio Circuit Court.**

1. **Contracts—Avoidance for Fraud—Settlement Between Injured Servant and Master—When May Be Avoided.**—A servant who  
• settles a claim against the master growing out of personal injuries may avoid the settlement if he can show that fraud was practiced in its procurement or that he did not have sufficient mental capacity to understand the nature or effect of the contract.
2. **Evidence—Statements of Unauthorized Persons to Induce Injured Servant to Settle Claim Not Competent.**—Where an injured servant was approached by persons not authorized to settle his claim, statements made to him by them are not competent in an action by the servant to recover damages from the master.

GLENN & SIMMERMAN and CHARLES H. MOORMAN for appellant.

HEAVRIN & WOODWARD and BEN D. RINGO for appellee.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

The appellee, Wayne Lee, while working for the appellant company, on July 9, 1910, as a section hand, was injured by being thrown from a hand-car on which he was riding, as the result of a collision with another hand-car. In January 1911, he was again injured, as he alleged, by the negligence of the company in the operation of its trains.

To recover damages for these injuries, he brought suit, and on a trial before a jury a verdict was returned assessing the damages in his favor on account of the injuries received in July at \$6,500, the jury finding in favor of the defendant on account of the January accident. On this appeal a number of reasons are assigned by the company why the judgment entered on the verdict should be set aside and a new trial granted, and we may here remark that as the appellee does not complain of the find-

ing against him on account of the January accident, the facts relating to it need not be noticed.

In its answer the company, after denying that the injuries received by appellee in July resulted from any negligence on its part, pleaded in bar of the action a settlement made with appellee on September 23, 1910.

In a reply the appellee averred that when he signed the paper pleaded as a settlement, he was in such mental and physical condition on account of the injuries received by him in the July accident that he did not know the nature or quality of his acts or understand or appreciate the meaning or effect of the paper that he signed, and further averred that his signature was procured by fraud, overreaching and misrepresentation on the part of the agent of the company.

In view of the conclusion we have reached as to the disposition of the case, it does not seem necessary to go into details concerning the nature of the accident or the extent of the injuries received by appellee. We may however, say in passing that there was sufficient evidence to warrant the jury in finding that the July accident was the result of negligence on the part of employees of the company superior in authority to appellee, and that the assessment in favor of appellee was not excessive considering the nature and extent of the injuries he received. With this matter out of the way, we will come at once to consider the effect of the settlement made with appellee and the circumstances surrounding the transaction, taking up afterwards other matters that are relied on by the appellant as grounds for reversal.

Putting the evidence of appellee in narrative form, he said that Perdue, a section foreman for appellant, Hammond, one of its track supervisors, Shaft, a claim agent and Starks, road master, came to see him at different times after he was injured and talked to him with reference to making a settlement with the company. He said he saw Mr. Starks the first time at Elmitch, several weeks after he was injured, and when he was able to go about, and that the following conversation took place between himself and Starks:

"He told me he had a letter from Mr. Logsden and was authorized to see me and see what I wanted, and I told him I didn't know how well I was getting along and I didn't know how serious I was hurt, and he said he would be glad to know what I wanted for a settlement, and I asked him then what he thought I was entitled to,

and he said he didn't know, that he had been authorized by Mr. Logsdon to make me an offer and he had to be governed by that, and I asked him how much, and he said \$150, and I told him I didn't think that was enough and he says, "We want to give you employment so you can go right to work," and I said 'Well, that would be different,' and I asked about the employment and he said he had different kinds, and I said, 'What kind of a job do you have for me?' and he said, 'Mr. Logsdon and I have talked about putting you on as lamp inspector,' and I said, 'What kind of a job is that?' and he said, 'To go over the division and inspect the switch lamps,' and I said, 'That would be running about all the time, won't it?' and he said, 'Yes, but I think that is what you need, is exercise and open air,' and I said, 'I don't think so; I think I need something like a stationary job,' and he said, 'This is all we have,' and I told him, I said, 'I don't know anything about it; possibly it would suit me if I understood it,' and he said, 'We mean to instruct you what to do,' and I asked him what this would pay, and he said, '\$1.60 a day,' and I said, 'Suppose I can't hold this job,' and he said, 'You won't know until you try,' and I said, 'If I try and fail, then what?' He said, 'We mean to give you something you can hold,' and I said, 'I don't know; possibly this will be the best thing I could do.' "

He further said that in this conversation Starks told him that he would send him a pass to come to Madisonville when he got ready, and that he replied that he would study the matter over and that on September 23d, he went to Madisonville and met Starks, when the following conversation took place:

"He said that he couldn't give me more than \$150, that he would give me this job and would settle with me, and I told him in case I wasn't able to do this work, then what? and he says, 'We will give you something; we mean to settle with you,' and informed me that the L. & N. Company was looking for good young men of good intelligence, and he had taken me to be one—I had proven to be at that time, and he believed I would get over this wreck, and in case I didn't he would give me a job I could see to and I told him I had been informed that I ought to have a writing to show I had a lifetime job, and he said, 'They will give you a lifetime job only this way, and I will guarantee you a job as long as you will do the thing right.' He says, 'It is the next thing, only we don't give

you any writing, and all I ask you to do is to sign a receipt for this \$150, and this is merely up to now, and we will settle the rest afterwards.' ”

He further said that as a result of this conversation he signed the following receipt: “Received of the Louisville & Nashville Railroad Company one hundred and fifty 00-100 dollars (\$150.00) in full compromise, settlement, and adjustment of all claims and demands on account of injuries to the person, including those that may hereafter develop as well as those now apparent, and damage to and loss of property, sustained by me, at or near Sunnysdale, Ky., on the 9th day of July, 1910, while a section laborer on said company’s railroad, and on every other account whatsoever.

“In making this settlement, no promise has been made to me of future employment, and the amount paid me in this voucher is paid in settlement of my claim as aforesaid, and not as lost time, wages, or otherwise than as aforesaid. And it is distinctly understood and agreed by me that the sole and only consideration inducing me to execute this release is the payment to me of the sum of money mentioned above.

“Before executing this release I have fully informed myself of its contents and I execute it with full knowledge thereof, and of my own free will and accord.”

Asked, “Did you know at that time, or did he tell you that that receipt was in full settlement of all the injuries you had received before that time?” he replied, “I did not.” “Q. Tell the jury what your general condition was then in September after your injury in July? A. It was very poor. I was nothing but a nervous wreck at that time. Q. Was a receipt ever read to you? A. I think not. Q. Did you ever read it? A. I don’t remember that I did; I don’t think I did. Q. I believe you did sign some sort of receipt for that \$150? A. Yes sir. Q. Do you remember when you signed a receipt that day? Do you think you signed some paper that day? A. I think I signed some paper that day. Q. Did you know that the paper you signed contained any such statement as has been read out of this paper? A. No sir; I did not. Q. What did induce you to sign this paper that Mr. Starks presented to you? A. I signed it as a mere receipt. Q. What induced you to sign it? Did you, or not, rely on what the man Starks said to you? A. Yes sir. Q. Did you believe what he had said about this was true? A. I believe he would stay with me. Q. Did you believe what he said about it

was true? A. Yes sir. Q. Did you read this receipt, or not? A. I don't know as I read that one. As I stated, I read something as a receipt, a mere receipt. Q. Did you read all of it? A. I don't know that I read all of it. Q. Was it ever read to you? A. No sir; I don't think it ever was."

Dr. Duff, the physician who attended appellee, was asked: "Was he, or not, competent at that time, September 23, 1910, by reason of his physical and mental condition, such as you have described, to attend to business and know and understand the effect of his acts and appreciate their effect? A. I don't think he was."

Without relating more of the evidence upon this point, it appears that on different occasions after appellee was injured Starks and other employees of the railroad company discussed with appellee the subject of making a settlement, and that the settlement made on September 23d was practically the same as the proposition that Starks had made as the basis of a settlement in the conversation with appellee some days before at Elmitch. It is very evident that the matter of making a settlement had been under consideration by appellee for some weeks or days before the settlement was actually made, and also that in the conversations he had with Starks no misrepresentations were made to him by Starks, nor was he deceived by anything that Starks said. It is also shown that appellee was paid the \$150 at Madisonville, and that he at once went to work as a lamp tender and continued in this employment until he was injured in January, 1911. It also appears that appellee had little education and no business experience.

There is some evidence that he believed he was signing a receipt for \$150, and that he did not know that the paper he signed was a settlement of any claim he might assert for damages, and there is some evidence that his mental condition was such that he could not understand or appreciate the effect of his acts. The evidence as to appellee's ignorance of the contents of the paper he signed, and as to his want of capacity to understand and appreciate it, is not at all satisfactory, but we think it was sufficient to take the case to the jury upon this issue, but there was no evidence to take the case to the jury upon the issue made by the pleadings that he was induced to sign the paper by fraud or misrepresentation.

The court, however, instructed the jury that if they believed from the evidence "that the plaintiff was not,

at the time the writing referred to was executed by him, mentally competent to understand the nature and effect of such contract, or if you believe that the agents and servants of the defendant fraudulently misrepresented to the plaintiff the terms and conditions of the said contract of settlement, and fraudulently represented to the plaintiff that the writing referred to was merely a receipt for the sum of \$150, and that it would not preclude him from collecting by suit or otherwise for such injuries as might prove to be permanent, and that the settlement was not final and was not meant to cover any future or permanent injuries, and that by reason of such fraudulent misrepresentations, if any made, by the agents and servants of the defendant, the plaintiff was induced to and did sign the written contract of settlement, relying upon the representations aforesaid." \* \* \*

In our opinion the court committed error in submitting any instruction upon the subject of fraudulent misrepresentation, or misrepresentations of any kind, made to appellee. The jury should only have been instructed on the subject of appellee's lack of mental capacity to understand the nature and effect of the paper he signed, and upon this point should have been told in substance that if in the paper signed by appellee, he agreed to accept \$150 in full settlement of all claims for damages arising out of the injuries he sustained in July, 1910, they should find for the defendant, unless they believed from the evidence that when appellee signed this paper he did not have mental capacity sufficient to understand its nature and effect and believed that he was signing a receipt for \$150 and not a settlement of any claim he might have for damages.

In reference to the admission of evidence, it was error to permit appellee to relate anything that any of the employees of the railroad company said in reference to a settlement except Starks and Shaft, or some one acting for them, or one of them. Starks, the Superintendent, and Shaft, the Claim Agent, had authority to make settlements, but it does not appear that the other persons did, and what they said to appellee was not competent for any purpose.

It was further error to submit to Dr. Duff the question in the form it was put as to the physical and mental condition of appellee at the time the settlement was made. Dr. Duff was not competent to testify on this subject unless he first qualified himself as an expert by saying that

he knew what the mental condition of appellee was when the settlement was made, and if he so qualified himself, the inquiry should have been limited to the competency of appellee to know and understand the nature, extent and effect of the contract he entered into.

It was further error for the court to permit appellee to make any statement concerning his financial condition, and the conduct of counsel in asking Arbuckle, who was injured at the same time appellee was, if efforts had been made to settle with him, and what he received in settlement, was highly prejudicial. It is true the court promptly sustained objections to these questions, but nevertheless the questions were manifestly improper, and we have so ruled in several cases. *L. & N. R. R. Co. v. Reaume*, 128 Ky., 90.

For the reasons indicated, the judgment is reversed, with directions for a new trial in conformity with this opinion.

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### **Daniels v. Charles, et al.**

(Decided June 3, 1913.)

#### **Appeal from Pike Circuit Court.**

1. **Finding of Chancellor—Substantial Justice.**—Where, upon a consideration of the whole case, it appears that the judgment of the chancellor did substantial justice between the parties, it will not be disturbed.
2. **Improvements—Dower.—Claim for Against Other Lands.**—Where the widow of an intestate is allotted dower and also purchases the remainder of the intestate's lands and in an action by her children, the deed to her is set aside on the ground that she was the administratrix of her husband, and the case is remanded to settle the accounts between her and the children, she cannot assert a claim for improvements erected on the land assigned her as dower.
3. **Dower.**—Where an intestate's land are leased before his death, and the widow is thereafter assigned dower in certain portions of his lands, she is not entitled to dower in the royalties paid on coal not mined from the dower land.

J. S. CLINE for appellant.

C. M. WHITE and P. B. STRATTON for appellees.



OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming on original and cross appeals.

This is the second appeal of this case. The opinion on the former appeal may be found in 140 Ky., 379, under the title of Charles, et al. v. Daniels, et al. William Daniels died in the year 1900, leaving a widow, Mary Daniels, and 13 children. He owned at his death a tract of land in Pike County, Kentucky, consisting of about 800 acres. The widow, Mary Daniels, qualified as his administratrix on April 25, 1900. She also qualified as guardian of the infant children. Soon after the death of William Daniels, the lands were partitioned, and Mary Daniels, the widow, was allotted dower in one-third thereof. Thereafter the remainder of the land was sold, and she became the purchaser. Some time later certain of the children brought suit to set aside the deed to her on the ground that she was the administratrix of her husband at the time of the purchase and could not, therefore, buy his land and hold it in her own right as against her children. The trial court set the deed aside. On appeal to this court the judgment was affirmed. In remanding the case, the court said:

“On the return of the case to the circuit court, it will be referred to a commissioner to take proof and report how the account stands between the plaintiffs and the defendant, Mary Daniels, crediting her with what she has paid, with interest from the time she paid it, and charging her with what she has received, including rents, as of the date she received each sum, as in the case of partial payments.”

On the return of the case it was referred to the master commissioner to settle the accounts between plaintiffs and defendant. Defendant, Mary Daniels, filed an amended answer and counterclaim, in which she alleged that six of the children were under the age of 21 years at the time of her husband's death, and that she was entitled to recover for the support and care of each of said children for a period of eight years, and that \$100 a year each was a reasonable amount for their care and support. Proof was heard, and at the May term of the Pike Circuit Court the master commissioner filed his report. He found that Mary Daniels had paid out certain sums, which, together with the interest thereon, amounted to \$2,910.21. He also found that Mary Daniels had received certain sums, which, together with

the interest thereon, amounted to \$2,865.38. He also concluded that the allowance of rent and the claim for maintaining the children should be offset against each other. Upon the filing of the commissioner's report, the widow filed exceptions thereto, based on the fact that she had paid out more than \$2,910.21 on the debts of the decedent, and had not received as much as \$2,865.38, the amount found against her by the commissioner. She also excepted on the ground that the commissioner failed to allow her the sum of \$5,000, the value of certain permanent and lasting improvements which had been placed on the land. She further excepted because the commissioner refused to allow her the amount of taxes she had paid on the land. Plaintiffs excepted to the report on the ground that the commissioner failed to charge the widow with the value of 86 trees sold at \$2 a tree, and on the further ground that she was not charged anything on account of rents. On the other hand, plaintiffs admitted that the widow should be given credit for the amount of taxes paid. At the September term, 1912, of the Pike Circuit Court, the widow filed an amended answer and counterclaim, in which she alleged that she had placed valuable, permanent and lasting improvements on the land in question, of the value of \$5,000, and that she had paid taxes thereon at the rate of \$50 a year for 12 years, amounting in all to \$600. This pleading was controverted of record. Thereafter Mary Daniels filed amended exceptions to the commissioner's report, based on the fact that she was not allowed anything for the support and schooling of her infant children. Later on, she tendered and offered to file another amended answer and counterclaim, wherein she pleaded that she and her husband, some years before his death, had leased, for a certain royalty, all the coal in and under the tract of land in question to J. K. Anderson, who had thereafter assigned his lease to the Thacker Coal Mining Company; that said lease was entered into by her and her husband before his death, and that she was entitled to one-third of all the royalties on coal mined and shipped from the land. A certified copy of the lease executed by Mary Daniels and William Daniels in William Daniels' lifetime was tendered and offered to be filed with the amended answer and counterclaim. The court, refused to permit the amended answer and counterclaim to be filed. On final hearing, the court confirmed the report of the commissioner, and ad-

judged that Mary Daniels should recover \$44.83, and that the rents and expenses of maintaining the children should be offset against each other. The court further adjudged that Mary Daniels had received on June 6, 1906, \$272 for 86 oak trees, and that this should be offset against the taxes she had paid on said land. From this judgment Mary Daniels appeals, and plaintiffs prosecute a cross appeal.

We think it reasonably certain that Mary Daniels actually received certain sums which, together with the interest thereon, aggregated the sum of \$2,865.38, the amount found by the commissioner and confirmed by the chancellor. There is testimony to the effect that the sums aggregating the above amount were either paid to her or paid to others by her direction. Even her testimony fails to show the contrary.

The court properly refused to allow Mary Daniels anything on account of improvements. The improvements were not made on the land in controversy, but on that part of the land assigned to her as dower. She could not improve the dower land, or purchase improvements made thereon by others, and claim a lien therefor on the remainder of the land.

While it is true that a widow may be endowed in a mine already opened, and it has also been held that where a valid lease was made by the husband in his lifetime, she is entitled to dower in the royalties, this rule applies only in the event the royalties are paid on coal mined from the land of which she is endowed. *Priddy v. Griffith*, 150 Ill., 560, 41 Am. St. Rep., 397. In the present case no coal has been mined from the dower land. Should any coal be mined there in the future, she may present her claim in an independent action.

While under the facts of this case Mary Daniels was not entitled to compensation for the support and maintenance of her infant children, yet she should not be charged with rent in their favor when they occupied the farm with her and derived their support from its cultivation. It also appears that certain of the older of plaintiffs occupied the farm in question during a portion of the time that their mother was in possession, while others visited her with their families and remained there for different periods of time. Taking into consideration these facts and the further fact that the taxes, though the amount proved is not very certain, probably exceeded the value of the timber which the

court erroneously fixed at \$272 instead of \$172, we conclude that the judgment of the chancellor does substantial justice and should not, therefore, be disturbed.

Judgment affirmed both on original and cross appeals.

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## **Louisville & Nashville Railroad Company v. Miller.**

(Decided June 3, 1913.)

### **Appeal from Bell Circuit Court.**

1. **Pleading—Lost Time—Defective Pleading—Introduction of Evidence Without Objection.**—When lost time is pleaded, but in a defective manner, and there is no motion to make the petition more specific, and evidence on the question is heard without objection, the adverse party will not be heard, after the court has properly instructed the jury and a verdict has been returned, to complain of the admission of the evidence and the instruction based on it. The error of the court in so instructing the jury will be deemed to be waived.
2. **Evidence—Res Gestae.**—Evidence of a statement made by the injured party two or three minutes after he was injured is admissible as a part of the res gestae.
3. **Evidence—Improper Admission—Error.**—In an action for damages for personal injuries, statements of plaintiff's mother to the effect that when plaintiff reached her house after he was injured she regarded his condition as serious because he was complaining, groaning and "taking on," even though inadmissible, is not of sufficient importance to justify a reversal.
4. **Pleading—Amended Answer—Refusal—Abuse of Discretion.**—The refusal of the trial court to permit the filing of an amended answer offered during the progress of the trial which in effect changes the defense and is not verified, and no reason is shown why it was not previously filed, is not an abuse of his discretion.
5. **Verdict—Excessive.**—In an action for damages for personal injury, evidence examined, and a verdict of \$1,000 held not excessive.

J. W. ALCORN, C. W. METCALFE and B. D. WARFIELD for appellant.

J. W. RAWLINGS, ROBERT HARDING and E. V. PURYEAR for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

In this action for damages for personal injury, plaintiff, J. T. Miller, obtained a verdict and judgment against the defendant, Louisville & Nashville Railroad Company, in the sum of \$1,000. The railroad company appeals.

The facts are as follows: Plaintiff was a brakeman in the employ of the defendant. The accident occurred in Bell County about seven miles from Pineville. The engineer, with seven or eight cars attached to the engine, was proceeding to a point where a box car was standing, for the purpose of moving the box car. The brake on the box car was set. The other cars attached to the engine were gondolas. When the cut of cars reached the box car, plaintiff coupled the box car to the train. He gave the engineer a signal to stand still. He then climbed on the box car for the purpose of releasing the brake. It was the duty of the engineer, under the rules of the company, to stand still until he got the signal from plaintiff to move. After the cut of cars was attached to the box car the engineer attempted to move the train, but was unable to do so. He then moved forward a few feet in order to take the slack out of the train, and backed his train with great force and violence, without having received any signal from plaintiff to move the train. Plaintiff fell from the box car and struck his back on the end of the gondola, and then fell to the ground. According to the evidence for the defendant, the engineer moved the train at the time with no more than the usual force, and he acted on a signal from a brakeman by the name of Eaton, who was on the third car and who claims to have received a signal from plaintiff to move the train. Plaintiff denies that he gave him a signal for the train to move.

The first error relied on is the action of the court in authorizing a recovery for lost time. The petition, after setting forth the negligence relied on, and the character of plaintiff's injuries, concludes with the following:

"And he has been disabled and lost time and been permanently injured, all of which has been and is to his damage in the sum of \$10,000."

It is insisted that as lost time is an item of special damage, and as the petition alleges neither the amount of time lost nor the amount of damages sustained on that account, the court erred in submitting the question of lost time to the jury. The following cases are relied on to sustain this position: *Lexington Ry Co. v. Britton*, 130 Ky., 676; *Central Ky. Traction Co. v. Chapman*, 130 Ky., 342; *Bluegrass Traction Co. v. Ingalls*, 140 Ky.,

488. In this case lost time was pleaded, but in such a defective manner that had a motion been made to make the petition more specific, it should have been sustained. No such motion was made. Thereafter evidence on the issue of lost time was heard without objection. It is the rule that where a matter in issue is defectively pleaded, and a party offers evidence in support of the matter so defectively pleaded, and there is no objection to its introduction, the adverse party will not be heard, after the court has properly instructed the jury and the verdict has been returned, to complain of the admission of the evidence, or the instruction based on it. In such a case the adverse party should object to the introduction of the evidence, and if he fails to do so, the error of the trial court in instructing the jury upon an issue not properly pleaded will be waived, although a general exception may be saved to the instruction. *Lexington & Eastern Ry. Co., et al. v. Field*, 152 Ky., 19.

The evidence of Raymond Sinkhorn and of Henry Miller, who testified that they got to plaintiff within two or three minutes after he was injured, and the plaintiff said he was hurt in the back and hip, and that he was lying there all doubled up on the ground and groaning and hollering, was competent as being part of the *res gestae*. *C., N. O. & T. P. Ry. Co. v. Martin*, 146 Ky., 260; *I. C. R. R. Co. v. Houtchens*, 125 Ky., 483; *L. & N. R. R. Co. v. Foley*, 94 Ky., 221.

The evidence of plaintiff's mother to the effect that when plaintiff arrived at her house after the accident she regarded his condition as serious, and based her opinion on the fact that he was complaining, groaning and "taking on," even if inadmissible, was not of such important character as to justify a reversal.

Among other things, the petition averred that "it was the duty of defendant's engineer in charge of said train not to move same forward until he should receive a signal to do so from this plaintiff, and until said brake was released." The petition then alleged that the movement of the engine was contrary to such duty. This averment was not traversed by the original answer. During the trial the defendant offered to file an amended answer in the following words: "The defendant, for amended answer, denies that it was the duty of the defendant's engineer in charge of said train not to move same forward until he should receive a signal from him to do so or until said brake was released." The plain-

tiff objected to the filing of the amended answer, and the court refused to permit it to be filed. The amended answer is made a part of the record. The purpose of filing the amended answer was to enable defendant to show that a brakeman by the name of Eaton, who was between the engineer and plaintiff, received the signal to move the train and thereupon transmitted it to the engineer; that the engineer had the right to receive a signal from Eaton, and if Eaton signaled him to move the train without a signal from plaintiff to do so, it was Eaton's negligence, or the negligence of a fellow servant, that caused the injury, instead of the gross negligence of the engineer. It will be seen, therefore, that the amendment would, in effect, have entirely changed the defense. This being true, and the amendment not having been verified, and no reason having been shown why it was not previously filed, the trial court, in refusing to permit it to be filed, did not abuse a sound discretion.

Lastly it is insisted that the verdict is excessive. The evidence shows that plaintiff fell from the top of a box car 12 or 14 feet high. His back first struck on the end of one of the gondolas, and he then struck the ground. He was confined to his bed for about three weeks. He says that he suffered severely from his injuries, and while after that time he had attempted to work, he could not work as he had formerly done, and always suffered when he did work. There is also evidence to the effect that he suffered from variocoele, and that his right kidney was displaced, and that this condition was due to his injury. One of the physicians testified that this condition would be permanent unless relieved by surgical operation. In view of these facts, and of the fact that the verdict is only for the sum of \$1,000, we cannot say that it is excessive.

Judgment affirmed.

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## Keystone Commercial Company v. City of Maysville.

(Decided June 4, 1913.)

Appeal from Mason Circuit Court.

1. Trial—Jury Trial in Equitable Actions.—Section 12 of the Civil Code of Practice providing for a trial by jury of issues of fact in an equitable action has no application where the pleadings fail to make an issue.

2. Pleading—Possession of Streets.—Where the petition of a municipality alleged ownership and exclusive control over a street which it had so held for the benefit of the public, generally, for fifty years, it stated a cause of action for injunctive process to require the defendant to remove its obstructions from the street.
3. Trial—Sufficiency of Evidence.—Where the answer fails to make an issue, the alleged insufficiency of the evidence to sustain the judgment is not open to review.

ALLEN D. COLE for appellant.

W. H. REES for appellee.

OPINION OF THE COURT BY JUDGE MILLER—Affirming.

On December 2, 1785, Patrick Henry as governor of Virginia, issued a patent to John May for 800 acres of land binding upon the Ohio River and Limestone Run in what was then Fayette County, later Bourbon County, and now Mason County, Kentucky. By an act of the General Assembly of Virginia, passed December 11, 1787, the town of Maysville in what was then Bourbon County, Kentucky, was incorporated, with Daniel Boone and five others named as trustees in the act. The town was located upon the John May survey above described; town lots were sold; and early in the last century the lot fronting on the south side of Third street between Sutton street and Maddox avenue, became the property of Michael Ryan. What was then known as a part of the county road but now known as Phister avenue, ran from Sutton street to Maddox avenue, leaving Sutton street at a point about 120 feet south of Third street. Ryan bought the property in question in 1848, and some years later he sold it to Purnell. The lot extended back to Phister avenue, which was referred to in the deed. From that time Phister avenue has been an open roadway or street, used by the public generally. In November, 1908, the city of Maysville brought this injunction suit against the Keystone Commercial Company, which in the meantime by mesne conveyances, became the owner of the Ryan lot upon the corner of Third and Sutton streets, to require it to remove a fence which it had placed across the rear end of its lot in such a way as to completely close Phister avenue. The plaintiff expressly claimed under the reservation of the Ryan deed which plaintiff alleged had been lost beyond recovery. The defendant answered with a traverse on December 23, 1908, and moved the court to transfer the case to the



ordinary docket for a jury trial upon the question of fact involved in the claim of ownership by the respective parties. The motion to transfer was overruled on January 9, 1909, and subsequently, on October 8, 1912, the plaintiff filed an amended petition in which it withdrew the allegations of the original petition in which it was stated the plaintiff had obtained the ownership and title to Phister avenue by a deed from Ryan; and in lieu thereof the amended petition alleged that the city had used and had exclusive jurisdiction over said old road or passway now known as Phister avenue, as a street, for more than fifty years, during which time it had used and treated said road as one of its streets and as a thoroughfare for the use of the city and the public generally. No answer was filed to this amended petition. The parties proceeded, however, by depositions to present their respective claims to the possession and ownership of Phister avenue; and upon a trial the chancellor granted the prayer of the petition; established Phister avenue as one of the streets and thoroughfares of the city of Maysville, and required the defendant to remove its fence; and from that judgment it prosecutes this appeal.

Appellant assigns three grounds of error; (1) that the court erred in overruling its motion for a jury trial upon the issue of fact; (2) that its demurrer to the petition should have been sustained; (3) that the chancellor's judgment is not sustained by the evidence.

1. Section 12 of the Civil Code of Practice provides that in an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial. The right given by the Code, however, is to trial of issues concerning which he is entitled to a jury trial; but if no issue be formed by the pleadings there is nothing to try. In the case at bar, the appellant failed to make any issue as to the allegation of the amended petition, which were distinct from and wholly different from the issues made by the original petition and the answer. We have carefully examined the answer to the original petition and find that it is not broad enough in its terms to make an issue with the allegations of the amended petition. It follows, therefore, that appellant had no ground for transferring the case to the ordinary docket since there was no issue to be tried.

2. Appellant criticises the petition because it fails to allege that appellee was in the actual, peaceable, uninterrupted and exclusive adverse possession of the street for more than fifteen years; and further because it is claimed, it shows upon its face that appellee, if its title to the street was good and sufficient, had an adequate remedy at law and that an injunction would not lie for that reason. The demurrer is not well founded, since the amended petition expressly alleged that the plaintiff owned said street and had had exclusive jurisdiction over it and had used it as a street and thoroughfare for more than fifty years. Of course, the ownership in the city was for the use of the public; and the amended petition alleged that it was so exclusively used for the public during the period mentioned. The petition was sufficient and the chancellor properly overruled the demurrer.

3. Little need be said as to the third ground that the judgment of the chancellor is not supported by the evidence. In the first place, as no issue was made, the allegations of the amended petition stood confessed, and no evidence was necessary to sustain plaintiff's cause of action. Furthermore, if we should treat the case as though an issue had been made upon the amended petition, the evidence fully sustains the finding of the chancellor.

Judgment affirmed.

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### McElwaine v. Commonwealth.

(Decided June 4, 1913.)

#### Appeal from Wayne Circuit Court.

1. Homicide—When No Eye Witness—Circumstantial Evidence—Instructions.—In a case of homicide to which there is no eye witness, and the Commonwealth must rely wholly upon circumstantial evidence in attempting to prove the guilt of the accused, the trial court should instruct the jury upon the law as to murder, voluntary manslaughter and self-defense as well as on the subject of reasonable doubt.
2. Homicide—Circumstantial Evidence—Instructions.—The above rule does not apply, however, where the testimony of an eye witness to the homicide, supported by a strong chain of circumstantial evidence, shows the crime to have been committed premeditatedly and with malice aforethought, and the only defense inter-

posed is the defendant's personal denial of guilt and an attempted alibi. As in such case the crime is murder or nothing, an instruction as to murder and reasonable doubt will give the jury all the law required for their guidance in arriving at a verdict.

3. Homicide—Evidence—Exhibit of Shells Found at Place of Killing.—As a breech loader double barrel shot gun was used in killing the deceased and three or more shots were fired in committing the crime, it was competent to exhibit to the jury two empty gun shells, identified as having been found at the place of the killing, upon a showing that they were of the kind and quality required for use with such a gun as the defendant was shown to have had in his possession at the time of the killing
4. Homicide—Evidence—Exhibit of Pieces of Deceased's Skull.—As according to uncontradicted evidence the shots by which deceased was killed tore away the top of his head and scattered parts of the brain and skull on the ground where his body lay, it was competent, after identifying them as the same found with the body, to exhibit the pieces of skull in evidence to the jury, without proving by a surgeon or anatomist that they were parts of the skull of a human being.

C. C. DUNCAN, J. C. DAVIS, W. B. BERTRAM and O. B. BERTRAM for appellant.

JAMES GARNETT, Attorney General, O. S. HOGAN, Assistant Attorney General for appellee.

#### OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, Andrew McElwaine, a negro, was tried, convicted and given the death penalty in the Wayne Circuit Court, under an indictment charging him with the murder of James Baker, also a negro. He sought a new trial in the court below and now asks of this court a reversal of the judgment of conviction on two grounds: First, that the trial court admitted incompetent evidence. Second that the court in instructing the jury failed to give all the law of the case.

To properly determine the questions thus presented, consideration of the evidence will be necessary. Appellant and Baker, prior to the day of the homicide, were in the employ of the Federal Government while it had under construction a lock and dam on the Cumberland River in Wayne County; the former having been at work for six months as a quarry hand, the latter for more than a year as a cook or waiter. The home of Baker was at Burksville, Cumberland County, that of appellant at Somerset, Pulaski County.

According to the evidence, both received two days before the homicide the wages due them. The killing occurred between eight and nine o'clock A. M. Baker, after avowing his purpose to return to his home at Burksville, hired of one Eads a mule upon which to make the journey. Before starting, however, he went to the store of Jim Coomer where he was soon followed by appellant who remained at the store until Baker mounted the mule and left.

It appears from the evidence that appellant was present when Baker hired the mule from Eads and then learned from the conversation between them what route deceased would take to reach the Monticello road in going to Burksville. Before leaving Coomer's store, appellant pointed to a place where Coomer had previously kept guns for sale, asked what had become of them and said he wished to purchase one. Upon being told by Coomer that the guns had been sold and that he had none for sale, appellant went from the store to the basement of a house occupied by the government employees where three guns were kept; one a double barrel shotgun. Tarrying but a moment in the basement he was seen by Bob Williams, a witness, who testified on the trial, to come out and leave the premises with something concealed under a raincoat he was wearing which made the coat stand out in the upper part of the back from his body. After the dead body of Baker was found a search of the basement disclosed the absence of the double barrel shotgun. A few minutes after leaving the basement appellant was seen by another witness, Alonzo Dickson, with a shotgun in his hand walking rapidly up a hollow that led to a quick intersection of the road Baker was traveling to reach the Monticello road and it was on the ridge not far from the head of this hollow that the dead body of Baker was found.

Henry Burriss met Baker on the road near where his body was found and after traveling a short distance further met appellant carrying a shotgun. He was going in the same direction Baker was traveling and asked Burriss if he met a colored man and said that the person referred to was leaving without his gun and he was taking it to him. After going a short distance, Burriss heard three or four shots.

There was one eye witness to the homicide, Josh Hunter, a colored man, who was leading a mule attached to a sled and on his way to the lock for sloop. According

to his testimony, appellant came along the road over which Baker had ridden and upon getting near him shot him in the back. The shot so alarmed Hunter's mule that it ran against or over him and while trying to keep out of the way of his mule or prevent its escape, he heard appellant order Baker to get off the mule he was riding and as the latter was getting off or falling off the mule, appellant shot him again, the shot-taking effect in his face or head. Hunter then hurriedly led his mule and sled out of the road and away from the place of shooting, leaving appellant standing over the body of Baker which was lying in the road.

Near the place of the homicide, Hunter met Harry Arthur, a white man, whom he told of the killing and the latter and a neighbor found the body of Baker where it had been dragged from the place of the killing and thrown into the bushes near the road. Before finding the body they discovered a large pool of blood, some of the brains of Baker and parts of his skull in the road where the shooting was done; the top of Baker's head had been blown off by the shot from the gun and some of them had entered the back, back of the head and also the face, neck and chest.

It was further found that the shirt of the deceased had been pulled over his head, his pockets turned inside out, and that there was no money upon his person, although he was known to have started from Coomer's store a few minutes before with money in his possession received in payment of the wages due him.

Appellant was not seen in the vicinity after the homicide, but was later arrested in Pulaski County, where he had remained concealed in the barn of a friend eight days.

The evidence seemed to show a double motive for the killing. Appellant in giving his testimony, admitted that on the night before the homicide he caught Baker cheating in a game of craps; that they had a quarrel and scuffle over the money which had been put up on the game and that in the scuffle one of the bills had been partly torn. He, however, claimed that early on the morning of the killing he had a talk with Baker and returned to him the money over which they had quarreled. The quarrel, together with the statement "come down off that mule, I mean what I say," appellant made to Baker at the time of the shooting in the presence of Hunter, furnished evidence of ill will and malice on the part of appellant toward

Baker and conduced to supply a motive for the homicide. In addition, proof of the rifling of Baker's pockets and taking of his money following the killing, which acts must have been committed by his slayer, conduces to show that the motive of the latter was robbery. In view of these facts, it is not wide of the mark to say, that in committing the crime appellant was actuated by a double motive.

The only attempted contradiction of the evidence of the Commonwealth is found in the testimony of the appellant, which not only denied his guilt, but also every fact that tended to show any opportunity on his part to commit the crime. Indeed, he claimed to have been on the opposite side of the Cumberland river from the place of the crime at the time it was committed, and in an attempt to prove this fact, introduced as a witness the owner of a shanty boat who testified that he ferried him across the ferry as he (the witness) believed at about eight o'clock on the morning of the murder; which testimony, if true, would have established an alibi for appellant. But the force of this testimony was destroyed by the admission of the witness that his watch was not at the time running, and that his opinion as to the time of day he ferried appellant across the river was based upon mere conjecture.

The careful consideration we have given the evidence convinces us that appellant's testimony, and that of the witness claiming to have ferried him across the river, was so wholly at variance with the many facts manifesting his guilt established by the Commonwealth's evidence, we are not surprised at its rejection by the jury. In our opinion a verdict declaratory of appellant's guilt was authorized by the evidence; and while the punishment inflicted is the severest known to the law, it was the province of the jury to fix it and in the absence from the record of prejudicial error in some ruling of the trial court, the verdict must stand.

It is appellant's contention that the court erred in admitting evidence of the finding of two empty cartridge shells on the ground at the place of the murder and in submitting them to the inspection of the jury; also in allowing the coroner to exhibit to the jury pieces of the skull bone of James Baker, without first proving by a competent anatomist that they were parts of a skull bone. Neither of these objections can properly be sustained. It was competent to prove the finding of the empty shells also to exhibit them to the jury. According to the

evidence, appellant killed Baker with a double barrel breech loader shotgun, in shooting which, shells of the size and quality of those found at the place of the killing were required; and if, as the evidence showed, appellant fired more than two shots at Baker, he had to remove from the gun the two shells first used, and being found where the killing occurred, the jury had the right to infer that they were removed by appellant and thrown to the ground to make room for two other shells which were used in firing the last two shots at Baker. The Commonwealth did not have the gun with which the killing was done, therefore, the empty shells could not be fitted to the gun, but in its absence the Commonwealth had the right, after identifying the shells as the two found, to prove, as was done, that they were of the kind used for a shotgun such as was employed to kill Baker.

The introduction as evidence of the pieces of skull bone was also competent. They were found where the killing occurred by the coroner with the blood and a part of the brains of the deceased, and as the top of the latter's head was shot off and some of the brains and pieces of skull were missing, it did not require a surgeon or anatomist to testify as an expert that the pieces of bone introduced in evidence were parts of the skull of a human being.

We find no merit in appellant's complaint as to the instructions. An instruction submitting to the jury the question whether he was guilty of voluntary manslaughter would have been improper, as would also an instruction upon the law of self defense. The crime was murder or nothing. There was no attempt upon the part of appellant to show that he acted in self-defense. On the contrary, his only defense was an attempt at proving an alibi. If he did the killing the act, according to the testimony of Hunter, the only eye witness, was murder. So if from the evidence the jury believed him guilty they necessarily had to find him guilty of murder. In cases of homicide to which there is no eye witness and the Commonwealth must rely wholly upon circumstantial evidence in attempting to prove the defendant's guilt, we have generally held that the trial court should instruct the jury upon the law of murder, voluntary manslaughter and self-defense, as well as on the subject of reasonable doubt; but this rule does not apply in a case like the one at bar where the testimony of the only eye witness to the killing, supported by a strong chain of circumstantial

evidence, shows the crime to have been committed premeditatedly and with malice aforethought, and the only defense interposed by the accused is a denial of guilt and an attempted alibi. *O'Brien v. Commonwealth*, 89 Ky., 363; *Mackey v. Commonwealth*, 80 Ky., 345; *Gatlift v. Commonwealth*, 32 Ky. Law Rep., 1063; *Steeley v. Commonwealth*, 129 Ky., 524; *Gordon v. Commonwealth*, 136 Ky., 508; *Bast v. Commonwealth*, 124 Ky., 747. In such a case an instruction as to murder and reasonable doubt will give the jury all the law required for their guidance in arriving at a verdict. They were thus instructed in this case and instructions as to voluntary manslaughter and self-defense were unnecessary and would have been improper.

The record disclosing no reason for disturbing the verdict, the judgment is affirmed.

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### **Cooper, et al. v. Washington, et al.**

(Decided June 4, 1913.)

#### **Appeal from Christian Circuit Court.**

1. **Easements—Action to Be Adjudged Owner of Passway—Evidence—Instructions.**—In an action seeking to be adjudged the owner of and entitled to the use of a passway and for damages for its obstruction, the jury under a peremptory instruction finding for defendants on the question of title, but finding that plaintiffs had a right of passway, under submission on that question, upon appeal by the defendants as to plaintiffs right of easement, there being no cross appeal by defendants, the questions of title and damage are eliminated, and the evidence as to whether the use was exercised as a matter of right, or was merely permissive, being irreconcilable, and the instructions properly submitting the issue, the judgment must be affirmed.
2. **Easements—Title—Evidence—Introduction of Incompetent Evidence—Harmless Error.**—In an action seeking to be adjudged the owner of and entitled to the use of a passway, the jury finding for defendants on the question of title under a peremptory instruction, the introduction of testimony by plaintiffs as to the giving of land for the passway by their ancestor and the remote vendor of defendants, and an instruction based upon it was harmless error. If the title to the land was in defendants as the court instructed the jury the jury could not have found that plaintiffs had the right to use the passway under an agreement with their vendor.



DOUGLAS BELL, TRIMBLE & BELL for appellants.

THOMAS P. COOK for appellees.

OPINION OF THE COURT BY JUDGE TURNER—Affirming.

This is an ordinary action by appellees against appellants seeking to be adjudged the owners of, and entitled to the use of, a certain alley or passway in Hopkinsville, Kentucky, and damages for the obstruction thereof by appellants.

On the trial in the lower court under peremptory instructions, the jury found for defendants on the question of title, but the case was submitted to the jury on the question whether plaintiffs had an easement in, or right of user of the alley, and also upon the question of damages for the obstruction thereof. The jury found that the plaintiffs had a right of passway in the alley, but failed to find any damages for the obstruction.

The defendants have appealed from the judgment giving to plaintiffs an easement in the alley, and as there is no cross appeal by the plaintiffs, the questions of title and damage are eliminated.

The alley in question is 16 feet wide and runs a little south of west from the Canton Pike back towards what is known as the Phelps farm in the edge of Hopkinsville, and along the south line of what is conceded by appellants to be the property of appellees.

The property of appellees is about an acre, shaped somewhat in the form of a triangle, running from a turn in the Canton road back westwardly. The alley until a few years ago was used not only by appellees and their ancestors, but was used by all the occupants and tenants on the whole Phelps farm for the purposes of ingress and egress to and from that place.

It appears from the evidence that both sides of this lane have been fenced for sixty or seventy years, and the evidence of appellees goes to show that they and their ancestors have claimed the right to use this lane, and have had the use of it for that length of time. On the other hand, it is shown by the evidence of appellants, that the title to this lane was always in the persons owning the Phelps land, and that the use of it by the appellees through all this long period was merely permissive. It may be said that the evidence as to whether the use was exercised as a matter of right, or was merely permissive is irreconcilable, and it only remains to inquire whether

the court in its instructions properly submitted this issue.

The court instructed the jury in substance, that if they should believe that the plaintiffs and those under whom they claimed, had used and claimed the right to use the alley continuously for fifteen years or longer, that the law will presume a grant of right of pass-way over the same, although the plaintiffs may not own an interest in the land; and in a separate instruction told the jury, that if they believe the lane in controversy was used by the plaintiffs and those under whom they claimed, not as a matter of right, but merely by the permission and consent of the owners thereof, such use would not confer upon the plaintiffs any right to the use thereof, no matter how long such use had continued. While it would have been better to have embraced these two ideas in the same instruction, but when read and considered together as they must be, they could not have misled the jury.

But it is claimed that these instructions do not require that the claim of right to the use of the lane was adverse; but the very assertion of the right to use a passway is in its nature adverse. And besides, the evidence in this case shows that appellees had the right to the use of the pass-way jointly and in connection with the owners and occupants of the Phelps farm, and in a strict sense they were not claiming the use of it adversely to them, but merely the right to the use of it jointly with them.

Fairly construed, the two instructions read together submitted the correct issue to the jury.

The plaintiffs in their petition set up an agreement alleged to have been made long years before, between their ancestor and Hiram Phelps, whereby each gave one-half of the land composing the lane; and some rather vague and uncertain testimony along this line was permitted to go to the jury. It is complained by appellants that this testimony, given by some of the plaintiffs, was incompetent because Hiram Phelps was long since dead at the time it was given.

The lower court submitted an instruction based upon this testimony, and it is insisted that there was no competent testimony upon which to base such an instruction. Assuming this evidence to have been incompetent, and that the instruction based upon it was improperly given, in view of the peremptory instruction of the court to find for appellants as to the title to the land, it was at the

most a harmless error; for if the title to the land was in the vendees of Phelps as the court instructed the jury, it is impossible that the jury could have found that the appellees had the right to use the passway under any such agreement with Phelps. It is clear from the whole record that the verdict was based upon the other two instructions. Upon the whole case we see no prejudicial error.

Judgment affirmed.

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### Stearns Lumber Company v. Inman.

(Decided June 4, 1913.)

#### Appeal from Whitley Circuit Court.

1. **Contracts—Measure of Damages—Instruction—Failure to Give.—Error.**—In an action for damages for breach of a contract, an instruction that gives the jury no guide by which to determine the amount of damages is erroneous.
2. **Contracts—Measure of Damages.**—Where plaintiff contracted with the defendant to cut and haul timber at certain agreed prices, and the defendant refused to permit plaintiff to carry out his contract, the measure of damages is the difference between the contract price and what it would have cost plaintiff to complete the work according to the contract.
3. **Contracts—Personal Services—Other Employment.**—A contract to cut and haul timber at certain agreed prices is not a contract for personal services and the failure of the plaintiff, upon the breach thereof by defendant, to use due diligence to secure other employment in no way affects his right to recover.

**SHARP, GATLIFF & SMITH** for appellant.

**R. S. ROSE and R. L. POPE** for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.**

On October 19, 1908, plaintiff, Frank Inman, entered into a written contract with the defendant, Stearns Lumber Company, by the terms of which plaintiff was to haul and log about a million feet of timber to the Kentucky & Tennessee Railroad side track for the defendant. He was to be paid different prices, according to the length and size of the timber, the prices ranging from \$5.25 to \$7.50 per one thousand feet. The contract also

provided that Inman was to deliver not less than 60,000 feet per month. There was a further provision to the effect that Inman was to be paid \$1.00 per thousand feet when the timber was delivered and the contract completed. The amounts due on this account are called the "retain."

Plaintiff, alleging that he was unlawfully discharged and prevented from carrying out the contract, brought this action against the defendant to recover the retain, amounting to \$450, and damages for breach of the contract. The jury returned a verdict in his favor for \$450 retain, and \$150 damages. From that judgment the defendant appeals. It appears that certain modifications were made in the written contract from time to time. According to plaintiff's evidence, the provision requiring the delivery of not less than 60,000 feet was waived, and a smaller amount was subsequently agreed on by the parties. Plaintiff began work in October, 1908, and worked under the contract alone until October, 1909. At that time he took Pleas Henkel in with him on the contract. The company agreed to the arrangement and advanced money for the purchase of a team. It is shown that more than a dozen scales or months of work were credited to Inman alone, while only two scales were credited to Henkel and Inman. When Henkel was taken in on the contract plaintiff agreed to give him half they made and half the retain. After they worked for a short while under this arrangement plaintiff claims he was discharged. According to plaintiff's evidence, he had delivered 450,000 feet, while defendant claims that the timber delivered was much less than that. Defendant's witnesses also testified that plaintiff voluntarily quit the contract, and was not notified of his discharge until he had quit. Henkel confirms plaintiff as to his discharge, and says that he was paid a part of the retain, but not all that was due him. The contract covered about a million feet of lumber.

One of the complaints of defendant is that Henkel, who is shown to be a partner, was not a party to the action. It is therefore insisted that plaintiff sued on an individual contract and proved a partnership contract. On that account it is argued that there was a complete variance between the pleadings and the proof, and that the court erred in failing to direct a verdict in favor of the defendant. As the case must be reversed for other reasons, we deem it unnecessary to pass on this

phase of the case. There is some evidence tending to show that Henkel was to have half of the whole retain, including the retain on the lumber previously delivered by plaintiff. If that is true, manifestly plaintiff is not entitled to recover all the retain himself. For this reason plaintiff, on the return of the case, will make Henkel either party plaintiff or defendant, so that the rights of all the parties may be properly determined.

Instruction No. 1 authorized a verdict in favor of the plaintiff for the amount of the retain, not exceeding \$450, in the event that plaintiff was ready, able and willing to carry out the contract, and the defendant wrongfully discharged him or refused to allow him to carry out the contract.

Instruction No. 3 is as follows:

"If you believe from the evidence that the plaintiff Inman, while engaged, in good faith, in carrying out and performing his part of the contract mentioned in the evidence, was discharged or prevented by the defendant company from carrying out and completing said contract, and that the plaintiff Inman thereby lost profits on said logging job and was unable after using due diligence, to secure employment of like character for himself, then you should find for the plaintiff Inman such a sum as you may believe from the evidence will fairly and reasonably compensate him for the loss of said contract with the defendant company, if anything, not to exceed the sum of \$500.50, but your finding upon the whole case cannot exceed the sum of \$1,000, the amount claimed in the petition. Unless you so believe your finding must be for the defendant company."

This instruction is erroneous because it gives the jury no guide by which to determine the amount of damages. *Lexington Railway Co. v. Herring*, 29 Ky. L. R., 794, 96 S. W., 558; *Board of Park Commissioners v. Donahue*, 140 Ky., 504.

In the case like this the measure of damages is the difference between the contract price and what it would cost the plaintiff to complete the work according to the contract. 9 Cyc., 783; *Horn v. Carroll*, 80 S. W., 518; *Williams, Kohler & Barrier v. Yates*, 113 S. W., 503. The instruction is also erroneous in another particular, though in this respect the error is in favor of the defendant. The contract sued on was not a contract for personal services; therefore, the failure of plaintiff to use due diligence to secure other employment could in

no way affect his right to recover for a breach of the contract. *Harris, et al. v. Ky. Fluorspar Co.*, 149 Ky., 65. This phase of the case should therefore be eliminated from the instructions.

On the return of the case and the making of Henkel a party, the parties will be permitted to amend their pleadings. As the facts now appear, plaintiff is entitled to recover only one-half the damages.

Judgment reversed and cause remanded for new trial consistent with this opinion.

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### City of Louisville v. Frank's Guardian.

(Decided June 4, 1913.)

#### Appeal from Jefferson Circuit Court. (Common Pleas, First Division).

1. **Municipal Corporations—Sewerage Commission of Louisville Distinct Corporation—Negligence of—City Not Liable for.**—The sewerage commission of Louisville is a distinct and independent corporation, and the city is not liable for the negligence of the servants of the sewerage commission.
2. **Municipal Corporations—Not Liable for Negligence of Servants in Discharge of Governmental Functions.**—A city is not liable for the negligence of its servants in the discharge of its governmental functions. The sewerage commission discharges a governmental function.

HUSTON QUIN and GROVER C. SALES for appellant.

O'DOHERTY & YONTS for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.

The Commissioners of Sewerage of Louisville in May, 1909, were constructing a sewer in Logan street, and had taken possession of the street for this purpose. While the work of digging the sewer was in progress, a drain was dug to prevent the water from going into the sewer trench. Theodore Frank, a little boy, was playing in the street and fell into the hole and was injured. This suit was brought by him against the City of Louisville to recover for his injuries. The proof for him on the trial showed that the hole was not properly lighted and barricaded; and that by reason of the negligence of the

servants of the sewerage commission in failing to light the hole or barricade it, his injury occurred.

The question to be determined is was the city liable for the negligence of the servants of the sewerage commission? In *Smith's Admr. v. Commissioners of Sewerage*, 146 Ky., 562, and in *Jones & Co. v. Ferro Concrete Construction Co.*, 154 Ky., 47, we held that the sewerage commission is not responsible for the negligence of its servants, and under the rule laid down in those opinions no action lies against the sewerage commission for the injuries here sued for. But it is insisted that although the sewerage commission is not liable, the city has charge of its streets and is liable if a hole is negligently left in the street.

The sewerage commission is a distinct and independent corporation created by the act of February 19, 1906 (Ky. Stats., Sec. 3037b). The purpose of the act was to secure for the city an adequate system of sewers for the protection of the public health, the money being provided by an issue of bonds upon a vote of the people. Sections 10 and 15 of the act, provide:

"And when any portion of said sewerage system shall be complete and ready for active operation, the commission shall restore the street, alley or other public way through which said completed work extends, to its original condition as near as practicable, and then notify the board of public works and turn over said completed portion to such board, and the same shall thereafter be under the exclusive control of said board of public works." (Sec. 10.)

"Section 2825 Kentucky Statutes, vesting a certain exclusive control in the board of public works, shall, to the extent that it conflicts with this act stand repealed; provided, that such exclusive control of the board of public works shall attach and thereafter continue as provided in section 10 of this act." (Sec. 15.)

Section 2825 Ky. Stats., which is thus suspended during the construction of a sewer on any street, is as follows:

"The board of public works shall have exclusive control over the construction, reconstruction, cleaning, repairing, platting, grading improving, sprinkling, lighting and using of all streets, alleys, avenues, lanes, market-houses, bridges, sewers, drains, wells, cisterns, ditches, culverts, canals, streams and water courses, sidewalks, curbing and the lighting of public places."

It will thus be seen that by the terms of the act the board of public works is divested of control over the street while the sewerage commission has charge of it for the purpose of constructing the sewer and until it notifies the board of public works and turns over the completed portion to the board of public works. The act was declared constitutional in *Miller v. City of Louisville*, 30 R., 664, and its clear purpose was to divest the city of the control over the street while the sewerage commission was constructing a sewer in it, in order to prevent conflicts of authority and to give the sewerage commission a free hand in the construction of an adequate system of sewers as contemplated by the act. The board of public works is the arm of the city government having charge of the city streets, and when the control of the street is taken from this board and vested in an independent corporation over which the city has no control, it is hard to see upon what principle the doctrine of *respondeat superior* can be applied; for it is the manifest purpose of the act to make the sewerage commission independent of the city authorities. In *Belvin v. City of Richmond*, 85 Va., 514, the court had ropes stretched across the street that the business of the court might not be disturbed. A lady driving down the street in a buggy was injured by the ropes which had been negligently left in the street after the court adjourned. The city was held not liable. In *Barnes v. District of Columbia*, 1 McArthur, 322, Congress authorized a railroad company to extend a branch of its road, and the plaintiff was injured by falling into an unlighted excavation made by it. It was held that the district was not liable. So in *Cox v. City of Philadelphia*, 165 Fed., 559, it was held that the city was not liable where it had no control of a work done by a contractor. We do not see how a different rule can be applied here.

In addition to this, in the cases above referred to, it is distinctly held that the sewerage commission is a governmental agency, and we have repeatedly held that the city is not liable in damages for the negligence of its officers acting as a governmental agency. In *Pollock v. Louisville*, 13 Bush, 221, it was held that the city was not liable for the wrongs done by its policemen and in *Greenwood v. Louisville*, 13 Bush, 226, it was held that the city was not liable for an injury done by the negligence of its fire department. These cases have been followed since in a long line of decisions. In *Twyman v. City of Frank-*



fort, 117 Ky., 518, it was held that the city was not liable for the negligence of its servants at a pest house. In *Schwalk's Admr. v. City of Louisville*, 135 Ky., 570, it was held that the city was not liable for negligence in maintaining its city hall. In *City of Louisville v. Bridwell*, 150 Ky., 589, many other cases on the subject are collected. In *Braunstein v. City of Louisville*, 146 Ky., 777, the plaintiff was injured on a street by a rock falling upon him which had been thrown in the air by a blast negligently fired by the city authorities at the city workhouse. It was held that the city was not liable for the reason that the maintenance of the workhouse was a governmental function. The doctrine announced in these cases has been so often adhered to by this court that it is no longer an open question. The circuit court on the evidence should have instructed the jury peremptorily to find for the defendant.

Judgment reversed and cause remanded for further proceedings consistent herewith. Judge Turner dissents.

## East Tennessee Telephone Company v. Jeffries.

(Decided June 4, 1913.)

### Appeal from Fayette Circuit Court.

1. Master and Servant—Evidence Upon Another Trial.—Upon another trial appellant may prove any fact connected with appellee's use of the ladder that may tend to show his knowledge of its defective condition before or when the injury was received.
2. Master and Servant—Evidence—Instructions.—In addition to the instructions set out in the opinion, the jury should be directed to find for defendant unless they believe from the evidence the ladder broke or by reason of its defective condition came apart.

GEORGE C. WEBB for appellant.

FALCONER & FALCONER, MAURY KEMPER and CHESTER D. ADAMS for appellee.

RESPONSE EXTENDING OPINION BY JUDGE SETTLE—(For Original Opinion, See 153 Ky., 133).

It will be competent for the appellant on another trial of this case, by a cross examination of appellee or through other witnesses, to prove that he used the ladder by which  
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he was injured in previously installing or removing other telephones; and also any other fact connected with his use of the ladder that may tend to show his knowledge of its defective condition before or when his injury was received.

Besides the instructions set out in the opinion the court should give following No. 1, this additional instruction:

"If the jury believe from the evidence that the ladder did not, by reason of any defective condition, either break or come apart, they should find for the defendant."

The opinion is extended in the particulars indicated.

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### **City of Louisville v. Hayden.**

(Decided June 4, 1913.)

#### **Appeal from Jefferson Circuit Court.**

**Damages—Personal Injuries Sustained in Falling Through Cellar Door—When City and Trustees of Church Not Liable.—**A cellar door at the side of a building which extends out on the sidewalk and extends up to the building, being higher at the building than at the sidewalk, is not placed there for the purpose of persons standing on it and looking into the building. Neither the trustees of the church nor the city are liable to persons thus standing on the cellar door for the purpose of watching the proceedings in the church, and injured by the falling of the cellar door, from its giving away under the weight put upon it, although the cellar door was in a defective condition.

**BENNETT H. YOUNG, HUSTON QUIN and MARION W. RIPPY** for appellant.

**O'DOHERTY & YONTS** for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—**  
Affirming in part and reversing in part.

The Calvary Baptist Church maintains a mission on the north side of Walnut street west of Twenty-eighth street in Louisville for colored people. The building sets back about three feet from the line of the street, and there is a cellar door extending from the building out upon the sidewalk, the cellar door being about five feet long and about twenty-five inches of the door being according to the weight of evidence, within the line of the

street. The cellar door is higher at the building than at the other end. There are no hinges upon it; the end next to the church rests upon timbers nailed to the side of the wall, and when the door is used it is simply lifted off. In June, 1909, they were holding a religious revival, and it was customary for people in the neighborhood, both white and colored, to gather around the church and look in at what was going on. In order to see better they frequently stood on the cellar door. On the night of June 24th, quite a crowd had gathered there for sometime, and about nine o'clock, among them was Loraine Hayden, a little girl about five or six years old. Loraine was standing on the cellar door near the building, and near her was Mrs. Minnie Bessels, who weighs something over two hundred pounds. There were two or three other persons standing on the door or standing on the frame on which it rested. The door gave way at the end next to the building and fell through into the cellar. The little girl and Mrs. Bessels fell into the hole. The child was seriously hurt and this suit was brought against the city of Louisville and the trustees of the church to recover damages for her injuries. At the conclusion of all the evidence the court instructed the jury peremptorily to find a verdict in favor of the trustees of the church, and submitted the case to the jury as to the city. The jury returned a verdict in favor of the child for \$1,000. The court entered judgment on the verdict and overruled the city's motion for new trial; the city appeals.

According to the evidence for the plaintiff the cellar door was in a rotten decayed condition, and this by casual inspection a passerby could readily discover; and according to the plaintiff's evidence Mrs. Bessels and the child were the only two people on the door, but according to the evidence for the city, there were other people on the door so that the entire weight upon it was about 800 pounds, and this forced off the timber nailed to the wall upon which the door rested, and thus caused it to fall. There was sufficient evidence of the rotten condition of the door to take the case to the jury, if the accident had happened in the ordinary use of the street. The proof conduces strongly to show that the child was really standing beyond the line of the street, but as there is some confusion in the evidence on this subject, we will treat the case as though she was within the line of the street, but was using the cellar door to stand on for the purpose of looking into the windows of the church. The

question is was the city liable to a person who was injured by such a use of the cellar door? In Dillon on Municipal Corporations, Sec. 1711, 4th Edition, it is said:

"From what has already been said, that negligence is the ground of the liability; it follows that a municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day; and whether they are so or not is a practical question to be determined in each case by its particular circumstances."

In *Ryther v. City of Austin*, 72 Minn., 24, an electric light pole had been put up in a cement sidewalk so as to leave a space of four or five inches between the pole and the curb. Ryther hitched his horse to the pole, the horse began pawing and finally got one of his feet fastened in the hole between the pole and the curb, and was so injured that he had to be killed. Holding the city not liable, the court said:

"We are of opinion that these facts do not tend to prove negligence on the part of the city, and hence that the court erred in not directing a verdict for the defendant. The poles were not erected or designed for hitching posts and the plaintiff was aware of that fact. He understood the situation, and all the risks, if any, of hitching horses to the poles, as fully as any of the city officials did. If he saw fit, for his own convenience to use the pole as a hitching post, he took it as it was, and assumed all the risks. If he had been driving along the street at night, and collided with the pole in the dark, a very different case would have been presented."

In *Stickney v. City of Salem*, 3 Allen, 374, the plaintiff stopped near a railing for ten or fifteen minutes, to talk to a friend and while standing there talking to his friend, leaned against the railing which gave way, and he was injured. The city was held not liable. The court said:

"The legal obligation of keeping a sufficient railing upon a highway is imposed only when it is necessary to mark the limits of that part of the road within which persons may safely travel, or to furnish a guard against dangerous places, so that proper protection may be afforded to those who in the exercise of due care as travel-

ers, while passing or standing on the way, might otherwise be exposed to accident or injury. If a person, without fault or negligence on his part, is forced against a railing, or takes hold of it to aid his passage, or falls against it by accident, or has occasion to use it in any way in furtherance of the lawful and reasonable exercise of his right as a traveler, and by reason of any defect or insufficiency it gives way and causes an injury, a town or city would be liable to make full compensation for the damages thereby occasioned. But this is the extent of the liability. A city or town is not bound by law to erect and maintain railings for persons to sit upon or lean against. They are not intended to be used for the convenience and accommodation of those who seek for a place of rest, while they stop in the highway to lounge, or to recover from fatigue, or to engage in conversation. If a person uses them for such purposes, he does it at his own risk. A town or city cannot be held liable for damages which are sustained by persons in consequence of improper or unauthorized uses of the highway, which occasion or contribute to accident."

The same ruling was made in *Blodgett v. City of Boston*, 8 Allen, 207, when a boy who was playing "old man on the castle" on a plank sidewalk in starting away, got his foot caught between the planks. The court, after pointing out that the duty imposed on the city is to keep the highway safe and convenient for travelers, said:

"It has accordingly been held that towns and cities are not liable for damages occasioned by defects in highways to persons who were not travelers thereon at the time the injury to themselves or their property was suffered."

A like ruling was made in *Sykes v. Town of Pawlet*, 43 Vt., 447, where the plaintiff had left the highway, and gone under a shed, and in attempting to get from out of the shed and back to the highway sustained an injury from a deep hole left by the side of the highway. The court said:

"Again, the duty of the town in reference to the margins of highways has never been extended beyond the requirement that they should be kept in a reasonably safe condition as against such accidents as are likely to, and actually do, occur in using the highway for the purpose of travel. In this case the backing into the gulf was not the result of an accident that occurred in using the highway for travel, but it resulted from using a shed by the

side of the highway, in an interval of cessation from travel, and attempting to get back into the road, after a voluntary departure from it."

The same principle has often been applied in suits between master and servant where the servant used something not intended to bear the weight which he put upon it, thus in *Sanders v. Eastern Hydraulic Co.*, 44 Atl., 630, the master was held not responsible to a servant who went upon a roof and put his foot upon a mullion of a window intended as a skylight, it being held that the mullion was intended to support the skylight and not for the purpose of a man standing upon it. In *Creberry v. National Transit Co.*, 28 N. Y. Sup., 291, the plaintiff was injured while leaning against a stay lath of a scaffold, the lath being intended only to keep the post upright. In *Schmidt v. Leistikow*, 43 N. W., 821, a miller was injured by the giving away of a spout in the mill, used for passing mill stuff from one part of the mill to another, he having climbed upon it to reach a certain place; and in *Kentucky Wagon Mfg. Co. v. Gossett*, 142 Ky., 842, a recovery was denied where a painter trusted his weight to a small guy wire used to keep steady the post upon which the tank rested. We do not see how this case can be distinguished from those cited. While the city was under obligation to keep its streets reasonably safe for the ordinary purposes of travel, it was not required to see that a cellar door was safe for the purpose of persons standing upon it and watching the proceedings in the church. The cellar door was not intended for this purpose. It inclined from the ground up, and while it would give persons standing on it an advantage to see what was going on in the church, it was plainly not constructed for this purpose, and persons who use it for such purposes, and were injured while so using it, have no right of action against the city or the trustees of the church.

For the reasons indicated, the circuit court properly instructed the jury peremptorily to find for the church trustees; but he erred for the same reasons in refusing to instruct the jury peremptorily to find for the city.

The judgment as to the trustees of the church is affirmed; but the judgment as to the city is reversed and the cause remanded for further proceedings not inconsistent herewith.

**Gee's Admr. v. City of Hopkinsville.**

(Decided June 5, 1913.)

**Appeal from Christian Circuit Court.**

1. **Municipal Corporations—Streets—Duty of City in Respect to.**—A city may leave its streets, in the condition in which they were when first established and set apart for public use, although they may then have been entirely unimproved, but if it undertakes to improve them, it must exercise ordinary care to put and keep them in reasonably safe condition for public travel, having, however a discretion as to the character and quality of the repairs or improvements that it may make, subject to the limitation that when completed the streets will be reasonably safe for public travel.
2. **Municipal Corporations—Streets—Liability for Unsafe Places in.**—Discretion as to Character of Repair.—A city is only guilty of actionable negligence when defects or unsafe places in a street that it constructs are the proximate cause of the injury complained of. If the street it constructs is reasonably safe, it is not to be made liable for the failure to adopt other methods of construction or the failure to do something that it might or might not do in its discretion.
3. **Municipal Corporations—Bridges—Duty in Respect to Erection of as Part of Street.**—A city is under no legal duty to construct a bridge across a river that runs through it, and therefore its failure to do so cannot be made the basis of an action for negligence, but when the city has erected a bridge, then it must exercise ordinary care to maintain it in reasonably safe condition for public travel.
4. **Municipal Corporations—Not Liable in Damages for Death of Person Drowned in River on Account of Failure to have a Bridge on a Street.**—Where a river traversed a city, and the city had macadamized and put in reasonably safe condition for public travel a street on both sides of the river and to the center of the bed, it was not liable in damages for the death of a traveler who attempted to cross the river at the street in the nighttime, after a heavy rain had swelled the usually shallow stream into a dangerous current.
5. **Municipal Corporations—Street Lights—Duty in Respect to.**—A city is under no duty to light its streets. It may, if it chooses to do so, leave them unlighted, and cannot be made liable in damages to a traveler who is injured solely because of its failure to light them.
6. **Municipal Corporations—Street Lights—Duty in Respect to.**—Where there are no defects or unsafe places in the streets, and they are in a reasonably safe condition for public travel, the city has a broad discretion as to the number and character of the lights that it will establish.

7. **Municipal Corporations—Street Lights—Duty in Respect to.**—In respect to the lighting of streets a city is, in no state of case, required to do more than furnish such lights as may be necessary to keep the character of streets that it has constructed in a reasonably safe condition for travel. It is not required to furnish lights to make safe that character of streets that it is under no duty to construct or maintain.

**DOUGLAS BELL, JOHN C. DUFFY, J. M. BYARS and TRIMBLE & BELL** for appellants.

**THOMAS P. COOK** for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

There runs through the city of Hopkinsville a stream of water called the West Fork of Little River that during heavy rainfalls becomes a swift, high and dangerous current, although in ordinary conditions it is passable on foot. Several of the streets of the city, including Second street, cross this river. On two of these streets the city has built bridges, and, many years ago it macadamized Second street on each side of the river to the center of it, thereby making it, when the river was low, a safe highway for vehicles as well as pedestrians.

In March, 1910, James Gee, who lived in Hopkinsville, went out into the country in his buggy early one morning and returned to the city on the same night after dark. During the day there was a heavy rainfall that made the river dangerous to cross at Second street, and when Gee, who did not know of the heavy rainfall, or of the condition of the river, attempted, on his return, to cross it at Second street, he was caught in the current and drowned. Soon afterwards his administrator brought this suit against the city to recover damages for his death, charging that it was due to the negligence of the city in failing to have a bridge across the river at Second street and in failing to have the street so lighted near the river as that travelers in the night might be able to discover before getting into it whether it was passable or not.

On the trial of the case, after evidence for the plaintiff had been introduced, showing that there was no bridge at Second street and that the street lights did not furnish sufficient light to disclose the condition the river was in, and when the case for the plaintiff had been closed, the court directed the jury to return a verdict for the defendant, and the plaintiff appeals.



Leaving out of view for the moment the question of lights, we may say at the outset that three propositions relating to the duty of municipal corporations in reference to streets are well settled. One is, that a city is under a duty to exercise ordinary care to keep its streets in reasonably safe condition for public travel. Another is, that this duty does not arise except as to streets that the city has undertaken to improve; and yet another is, that the manner or method adopted for the improvement of streets that the city undertakes to improve is left to the discretion of the governing authorities of the city.

To state these propositions differently, the city may leave its streets, or any of them, in the condition in which they were when first established and set apart for public use, although they may have then been entirely unimproved, but if it undertakes to improve them, it must exercise ordinary care to put and keep them in reasonably safe condition for public travel, having, however, a discretion as to the character and quality of the repairs or improvements that it will make, subject to the limitation that when completed the streets will be reasonably safe for public travel. *Clay City v. Roberts*, 124 Ky., 594; *Moore v. City Council of Harrodsburg*, 32 Ky. L. R., 384; *Harney v. City of Lexington*, 130 Ky., 251; *Arnold v. City of Stanford*, 113 Ky., 852; *Campbell v. City of Vanceburg*, 101 S. W., 343; *City of Maysville v. Brooks*, 145 Ky., 526.

Applying with some little elaboration these principles to the case we have, we think it clear that the city was under no legal duty to construct a bridge across this river at Second street, and therefore its failure to do so could not be made the basis of an action for negligence. *Dillon on Municipal Corporations*, Vol. 2, Sec. 728; *Leslie County v. Wooten*, 115 Ky., 851. The city, in the exercise of the discretion vested in it, decided, as it had the right to do, not to erect a bridge as a part of Second street but to macadamize the street on each side of and across the bed of the river, and there is no claim that there were any defects or unsafe places in this improvement as it was made. The death of plaintiff's intestate was not caused by defects in the condition of the street as it was constructed but by causes attributable to other agencies over which the city had no control and to conditions that the city did not have any part in creating.

It is of course true that if the street had crossed the river on a sufficient bridge, the accident that brought

about the death of Gee would not have occurred, but as the city had provided such a way as, in its judgment, was reasonably safe, and the accident was not due to any defect in this way, or in the manner of its construction the city can not be made liable on the ground that it should have erected a bridge. A city is only guilty of actionable negligence when defects or unsafe places in a street that it constructs are the proximate cause of the injury complained of. If the street it constructs is reasonably safe it is not to be made liable for the failure to adopt other methods of construction or for the failure to do something that it might or might not do in its discretion.

If, however, the city had erected a bridge across this river as a part of Second street, then the law would have imposed upon the city the duty of exercising ordinary care to maintain this bridge in reasonably safe condition for public travel, but it assumed no liability for its failure to erect one.

Coming now to the question of lights, the same principles apply as do in the construction of streets. A city is under no duty to light its street, it may, if it chooses to do so, leave them unlighted, and cannot be made liable in damages to a traveler who is injured solely because of its failure to light them. There is, however, some apparent conflict in the authorities as to the duty and corresponding liability of the city where it undertakes to light its streets but does not light them sufficiently to give notice to travelers of conditions that would not be unsafe or dangerous in the daytime but that might be dangerous at night. We think, however, that this apparent conflict is due to the fact that the cases holding the city to the duty of furnishing adequate lights arose when the injury complained of was caused by some defect or unsafe place in the street that could have been avoided if the street had been properly lighted, rather than the failure to furnish sufficient lights when the streets as constructed were in reasonably safe condition for public travel.

Of course if there are defects or unsafe places in a street, the city is under a duty to exercise ordinary care to warn the traveling public, by lights or other reasonably sufficient means in the night time, of these defects or unsafe place, and if it fails to do this, will be liable to any person injured by reason of such failure: *Grider v.*

Jefferson Realty Co., 116 S. W., 691; City of Georgetown v. Groff, 136 Ky., 662.

But where there are no defects or unsafe places in the streets, and they are in a reasonably safe condition for public travel, the city has a broad discretion as to the number and character of lights that it will establish, and cannot be made liable in damages for the failure to furnish such number and quality of lights as would better illuminate the streets than those provided. Dillon on Municipal Corporations, Vol. 2, Sec. 1010; City of Daytona v. Edson, 46 Fla., 463, 4 A. & E. Ann. Cases, 1000; White v. City of New Bern, 146 N. C., 447, 13 L. R. A., (n. s.) 1166.

But if we should assume that a city was under a duty to maintain a greater number of lights than it had provided, and such number as would well light its streets, we are quite sure that the city is not required to do more in this respect than furnish such lights as may be necessary to light reasonably well the character of streets that it has constructed, and it is not required to furnish such a number of lights as might be required to make safe that character of street that it was under no duty to construct or maintain. In other words, when the city has provided sufficient lights to make the streets that it has constructed reasonably safe for public travel, this, in any state of case, is its full measure of duty in respect to lights.

If this view is correct, it follows that as the lights furnished were sufficient for the character of street that was constructed, the plaintiff failed to make out a case on account of inadequate lights, as there is no claim that the lights were not sufficient to afford reasonable protection for the character of street that the city had constructed at the place where appellant's intestate lost his life.

For the reason indicated, the judgment of the lower court is affirmed.

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### **Brown v. Daniels.**

(Decided June 5, 1913.)

Appeal from Johnson Circuit Court.

Appeal—Effect of Failure of Counsel for Appellant to Brief Case.—  
When counsel for appellant do not point out in a brief any error

in the judgment appealed from or assign any reason why it should be reversed, this court, having neither the time nor the inclination to hunt for errors that might justify a reversal, will assume that the judgment appealed from is correct, and affirm it.

J. F. BAILEY, C. B. WHEELER for appellant.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

This record of 262 pages involves the settlement of complicated accounts. There is no brief for appellee, but we have been favored by counsel for appellants with the following paper, styled "brief for appellants:"

"This action was originally brought in the Johnson Circuit Court by Grant Daniels, former sheriff of Johnson County against M. V. Brown, deputy sheriff under him, and W. H. Dorton, W. H. Estep and C. M. Thomas as his securities, wherein the said Daniels asked to recover from said Brown and his sureties the sum of \$2,600 for taxes which this appellee claimed to be due from said Brown and his sureties as such.

"Brown answers and shows that he has paid to Daniels all the taxes due him for the four years as deputy, except the amount then remaining uncollected on the tax-books, which he (Brown) offers to turn back to Daniels. The sureties of Brown make the same defense as Brown, except they have additional defenses, one of which that they are released as sureties because the bond they signed to Daniels as such sureties was never completed, in that other parties were to sign same. Other defenses are set out as will appear from a reading of the answer and the several amended answers.

"The case was referred to the master commissioner, whose report was very favorable to Daniels. Exceptions were filed to the report by these appellants, and upon the trial of same, the report was substantially affirmed.

"This court is called upon to go over the entire settlement between these parties covering a period of four years and adjust their differences."

When counsel for appellants do not point out in a brief any errors in the judgment appealed from or assign any reason why it should be reversed, this court, having neither the time nor the inclination to hunt for errors that might justify a reversal, will assume that the judgment appealed from is correct, and affirm it.

Judgment affirmed.

**Louisville & Nashville Railroad Company v. Parks' Administrator.**

(Decided June 5, 1913.)

**Appeal from Woodford Circuit Court.**

1. **Pleading—Petition—Amended Petition.**—It was not error to permit an amended petition to be filed, the allegations of which might properly have been set up in the original petition, where a sufficient time elapsed after its filing to allow the opposite party to prepare and present his defense thereto.
2. **Railroads—Crossings—Obstruction of View—Negligence.**—It is negligence on the part of a railroad company to permit its right of way near a crossing to become foul with vegetation and underbrush so as to obscure the view of travelers upon the highway.
3. **Railroads—Evidence—Competency.**—Evidence as to the growth of vegetation and underbrush on a highway near a crossing is competent, in an action for injury at such crossing, as tending to show the dangerous nature of the crossing and the duty of the railroad company to employ signals, in addition to those required by statute, to warn the public of the approach of its trains.
4. **Railroads—Appeal—Review—Witnesses—Number and Credibility—Evidence.**—While the numerical superiority of the witnesses is with appellant, their credibility is for the jury; although the weight of the evidence is with appellant, if its preponderance is not overwhelming in character, the verdict will not be disturbed.
5. **Appeal—Verdict.**—In an action for death, where the evidence shows the earning capacity of decedent to be something like \$1,000 a year and his expectancy to be practically twelve years, a verdict for little less than \$6,000 will not be set aside as excessive.
6. **Appeal—Instructions—Harmless Error.**—In an action for personal injury an instruction as to the care required of the deceased for his own safety should be in the same terms as that as to the care required of the wrongdoer, but where the language used is practically the same, a reversal will not be ordered.

**BENJAMIN D. WARFIELD and WALLACE & HARRISS** for appellant.

**FIELD McLEOD, ROBT. B. FRANKLIN** for appellee.

**OPINION OF THE COURT BY JUDGE LASSING—Affirming.**

Thomas Parks was struck and killed, on June 20, 1911, by a west bound train of the Louisville & Nashville Railroad Company at a grade crossing in Woodford County. This crossing is at the intersection of the right of way of the Louisville & Atlantic division of the railroad com-

pany with the Elm corner and Pinckhart turnpike, a public highway, and is known as Elm corner or Lyon's crossing. Parks was driving along the highway, and his horse was injured and his vehicle and harness were demolished as a result of this accident. Parks' administrator sued the railroad company for damages sustained by the death of his intestate, and for the injuries to his horse, conveyance and harness, alleging that his loss was due to the negligent operation of said train. Defendant answered, traversing the material allegations of the petition and pleading contributory negligence, which plea was controverted by reply. Later the petition, in so far as it sought to recover for the injury to the horse, wagon and harness, was dismissed without prejudice. Plaintiff amended his petition and therein charged that the crossing in question was some five or six feet below the ground level and the approaches thereto, both along the railroad and turnpike, were through cuts, which fact made the crossing an unusually dangerous one; that, upon the occasion of the accident, the defendant negligently failed to give any proper or reasonable warning to plaintiff's intestate of the approach of said train, or to employ any reasonable means to that end; that it failed to provide the engine of said train with a steam whistle, or to have it in condition to sound; that it omitted to ring the bell or to sound the whistle for a distance of at least fifty rods from said crossing until it reached same; and that it negligently permitted its right of way on both sides of the track, especially on the southern side thereof, for a distance of at least 400 feet east of the turnpike to be covered and filled with growing weeds, brush, sprouts and high grass, which prevented the operatives of said train from seeing the approach of plaintiff's intestate and the latter from seeing or hearing the train before being struck. Motions to strike said amended pleadings from the files, to strike therefrom, and a demurrer thereto, were filed and overruled. The defendant's answer to the amended petition completed the issue. Upon a trial, the jury returned a verdict for plaintiff for \$5,980. From the judgment entered thereon, defendant appeals.

The petition was filed in September, 1911. In October following, the defendant answered, and in addition to traversing the material allegation of the petition pleaded contributory negligence. A reply completed the issue. Thereafter, plaintiff filed an amended petition and caused summons to be issued thereon, and in this

amended petition alleged facts upon which he would be authorized to introduce proof showing that the crossing, where his decedent was killed, was an unusually dangerous one. It was also alleged in the amended petition that the whistle on the engine was defective. Before the case came on for trial, a motion was made by the defendant to strike this amended petition from the file. This motion was overruled, as was also a motion entered by defendant to strike out certain portions of the amended petition. Complaint is made that the court erred, first, in permitting said amendment to be filed, and second, in overruling its motion to strike same from the file. Appellee filed this amendment evidently because he feared that, under the general allegations of negligence, he would not be permitted to show that the crossing, at which the accident occurred, was an unusually dangerous one or that the whistle on the engine was defective, but whatever his purpose, we fail to see wherein appellant was prejudiced by reason of the court's refusal to strike said amendment from the file. The condition of the whistle on the engine was certainly a legitimate subject of inquiry and if, as a matter of fact, it was defective and as a result thereof the employees of appellant in charge of the train could not give such notice of the train's approach to the crossing as the law contemplates, appellee would certainly have been justified in showing this fact. So, likewise the conditions surrounding the crossing were a proper subject of inquiry in a case where it is alleged that the company, owing to the peculiar conditions and circumstances surrounding the crossing, may be required to use more than the statutory means to avoid injuring persons thereon. The object of the amendment was to prevent appellant from claiming that it was taken by surprise or that it was not fully advised of the ground upon which appellee rested his right to recover. Had all these facts been set out in the original petition, and a motion, to strike out the allegations made for the purpose of charging that the whistle was defective and that the crossing was an unusually dangerous one, had been made and overruled, it could not be seriously contended that the court erred. Since appellant was fully advised of these facts a sufficient length of time before the case was called for trial to enable it to prepare its case to meet the amended allegations of negligence, it is in no position to complain of the court's ruling.

This brings us to the complaint as to the admission of evidence showing the presence of weeds, briars and vegetation along the railroad right of way and the highway near the crossing. It is insisted that, as the railroad company was not chargeable with the duty of keeping the vegetation, weeds, briars, etc., from along the highway, it could not be said to be negligent because of their presence along the highway between the railroad and the highway at that point. This evidence was offered for the purpose of showing the condition at and surrounding this crossing, in order that the jury might determine whether or not it was an unusually dangerous crossing. Some of the witnesses for appellee testify that the weeds, briars and bushes along the railroad right of way varied in height from four to eight feet; and the evidence for the company is to the effect that there was some vegetation growing along a part of the railroad right of way, in places as much as knee high. It is negligence on the part of a railroad company to permit its right of way to become foul with weeds, briars, underbrush, etc., as was expressly held in *L. & N. R. Co. v. Clark*, 105 Ky., 571, and *L. & N. R. Co. v. Breeden*, 111 Ky., 729. It is not clear from the evidence whether the undergrowth which obstructed the view was to any considerable extent on the right of way, but the proof abundantly shows that the vegetation was luxuriant along the roadside between the railroad and the public road. The fact that vegetation of this character was permitted to grow up along the side of the public road, is not chargeable as negligence against the railroad company, but if, as a matter of fact, the approach to the crossing was obscured by reason of such growth of weeds, briars, brush, etc., as to render the crossing an unusually dangerous one, and this fact was known to the company, it was then a question for the jury to say whether or not, under the circumstances, it was incumbent upon the company to use other and additional means than those provided in the statute to warn the public of its train's approach.

The case is not unlike that presented where houses are built along the roadside near crossings and which obstruct the view of travelers, when passing along the highway and over crossings, and prevent them from seeing the approach of trains. The difference is in degree merely. A house would totally obstruct the view, whereas weeds, briars and underbrush might or might not obstruct it entirely, dependent upon the character and



height of their growth. Since the railroad and the public road each ran through a cut at the point of intersection, it is readily seen that the growth of weeds, briars, or underbrush to any extent in between the two rendered it all the more difficult on the part of one traveling the highway to observe the approach of the trains.

It is in evidence that the train was rolling down grade at about 30 or 35 miles an hour and that the steam was shut off, hence it was making less noise than it would have made had it been running under steam. The rattle of the wagon in which he was driving more than likely prevented decedent from hearing the train's approach, and if the conditions, on account of the growth of underbrush, briars, etc., were such that his view of the railroad was totally obscured at that point, it can readily be seen that if, as is testified by some of the witnesses, no signal of the train's approach was given, decedent was furnished no means of advising himself of the danger into which he was going. The evidence does not show that this road was a much frequented one, but, under the evidence as to the nature of the crossing and the conditions surrounding it, we would be unwilling to hold that it was not proper for the court to submit to the jury the question as to whether or not it was an unusually dangerous crossing; hence, the evidence relating to the nature of this crossing was competent.

It is next insisted that the verdict is not supported by sufficient evidence and is flagrantly against the evidence. Numerically the evidence offered by appellee to the effect that no signal of the train's approach to this crossing was given is outweighed by the evidence for appellant bearing upon this point, but, as is frequently stated, the jury is the judge of the credibility of the witnesses, and they have the right to accept the settlement of a few witnesses in preference to that of the many who may testify to the contrary. So that, while the weight of the evidence upon the question of signal or no signal is with appellant it is not so overwhelming in character as to justify us in holding that because of its preponderance the verdict should be disturbed.

It is next urged that the verdict is excessive. The evidence shows that the decedent had an earning capacity of something like \$1,000 per year. His expectancy, according to the life tables, was practically twelve years. Under this proof, we would not be warranted, were we so inclined, in holding that a verdict for less than \$6,000

was excessive. Much larger verdicts have been upheld, where the earning capacity was shown to have been very much less, and the expectancy little more.

Lastly, it is insisted that the court erred in instructing the jury. The instructions given were copied from the case of *L. & N. R. Co. v. Lucas*, 30 Rep., 364, and, in slightly varying form, have been approved in numerous other cases where a similar question has been involved. We are of opinion that they fairly presented the issues as made by the pleadings and as warranted by the facts. While the instruction, defining the degree of care which should be exercised by decedent in approaching the crossing, might have been more explicit, we do not feel that it was prejudicial in the form given. The better plan would have been to cast upon decedent in terms the same degree of care which was imposed upon appellant in approaching the crossing, but the language used in the instruction, while not the same, was in effect the same. The jury evidently did not believe that any signal of this train's approach was given and that, as the train was merely rolling down the track as it were, the decedent drove upon the track without knowledge of its approach and met his death. As there was evidence from which such conclusion could be fairly drawn, we see no reason for disturbing the jury's finding and the judgment predicated thereon. It is, therefore, affirmed.

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### **Smith's Executor, et al. v. Johns.**

(Decided June 5, 1913.)

#### **Appeal from Pike Circuit Court.**

1. **Husband and Wife—Antenuptial Marriage Settlements—Estoppel.**—Where it is apparent that both parties to an antenuptial marriage settlement intended that the title of the wife to lands agreed to be conveyed should vest at once, the husband and those claiming under him are estopped to deny that her title thereto is not perfect, in so far as the husband could make it.
2. **Husband and Wife—Wife's Separate Estate—Husband as Trustee—Rents—Accounting.**—A wife, in permitting her husband to manage and collect rents from her separate estate, does not waive her right to have him account to her for such rents.
3. **Husband and Wife—Evidence—Presumptions.**—In the absence of an agreement or understanding to the contrary, the husband in collecting rents and receiving income from the wife's separate estate will be treated as her trustee.

4. Husband and Wife—Contracts.—It being the duty of the husband to support the wife in a style befitting their station, the wife is not liable to the husband for expense of keeping her live stock or for money expended for her benefit in the absence of an agreement to pay or reimburse him.
5. Limitation of Actions—Statutes—Construction—Coverture.—The Weissinger act (Secs. 2127-2128 Ky. Stats.), did not remove that disability of coverture which prevents the running of the statutes of limitation against one under the disability of coverture.
6. Limitation of Actions—Accrual of Cause of Action.—An action by the wife against the estate of her husband for an accounting of rents received by him from her separate estate does not accrue until his death.

STATON & PINSON for appellants.

CHILDERS & CHILDERS for appellee

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

On February 24, 1896, Jacob Smith and Georgia A. Williamson entered into an antenuptial contract the material portions of which are as follows:

“This contract of marriage settlement, and deed made and entered into this 24th day of February, 1896, by and between Jacob Smith of the first part, and Miss Georgia A. Williamson of the second part, witnesseth: That in consideration of the mutual promise of each of the parties hereto to marry each other in a reasonable time after the date hereof they have and do agree that the said party of the first part is to and does hereby convey unto the party of the second part the two tracts of land hereinafter described to be hers absolutely and in fee and without any curtesy rights upon the part of said party of the first part should he survive the party of the second part; and in addition thereto should the party of the second part survive the party of the first part she is to receive from his estate in money the sum of one thousand dollars to be paid to her in a reasonable time after the death of the party of the first part, in consideration of the foregoing the party of the second part waives, surrenders and relinquishes all right to dower and homestead in any and all the lands now owned or possessed by the party of the first part, in the State of Kentucky and West Virginia, or in any other state, territory or district, as well in all those he may hereafter own, or possess wherever situated. And so waives, surrenders and relinquishes all title or right to recover any further from

his estate, real, personal or mixed, should she survive him."

The lands mentioned are described in the contract by metes and bounds.

The contracting parties were later married, and lived together as man and wife until June, 1906, when Jacob Smith died. In February, 1910, his widow, who had in the meantime married again, brought suit against the personal representatives of her husband, his heirs and devisees, in which she sought to recover of them \$1,052, which sum she alleged her husband had received as rents from her lands from the time of their marriage down to and including the year 1905. The defendants denied liability, pleaded the statute of limitation and alleged, by way of set-off, that plaintiff was indebted to the estate in a sum largely in excess of the claim sued on for provender furnished her for her live stock and for money expended by her husband for her benefit during their married life. Issue was joined upon each item of defense, proof taken, and upon final submission the chancellor was of opinion that plaintiff was entitled to recover of the estate of her husband the sum of \$525 as rents, and entered judgment accordingly.

At the outset, it is insisted that the evidence fails to show that the decedent ever delivered to his wife a deed for the two tracts of land described in the marriage contract. The contract recites that, as a part of the consideration for its execution, the decedent agreed to and did convey to her this property for her sole and separate use. It is apparent that it was intended by both the parties to this contract that the wife should at once be invested with title to these lands; and being hers and for her sole and separate use, if her husband were now living, it would not lie in his mouth to state that her title thereto was not perfect, in so far as he could make it. He could not defeat her rights by any delay in the discharge of any duty which the contract, by its plain terms, imposed upon him.

Nor would the husband be in a position to withhold from her the rents and profits realized by him out of this land. The land was hers, and the income thereof belonged to her. Under the act of March 15, 1894, known as the Weissinger act, the rights of married women were enlarged to such an extent that they were authorized and empowered to act for themselves in the management of their separate estates. The fact that appellee permit-

ted her husband to represent her, in renting out this property and in receiving the rents, cannot be construed as a waiver on her part of her right to have her husband account to her for the rents so received by him for her benefit. In the absence of some positive agreement or understanding to the contrary, he will be treated as acting as trustee for his wife in the collection of the rents and income from her separate estate, as was expressly held in *Chorn v. Chorn*, 98 Ky., 627. The contract was intended to be beneficial to her during their married life, else it would have provided that, at her husband's death, she surviving him, she should receive this property. The fact that he obligated himself to invest her, at once, with title manifests clearly that he purposed to give her whatever benefits should arise therefrom, from that time on. Appellants are in no better position than decedent, if living, would have been, and as he could not withhold this rent from his wife neither can they.

The record shows that decedent was a man of means, and more than able to maintain his wife and such live stock as she had and kept at his home in the way and manner described in the pleadings and evidence in this case. As her husband, it was his duty, and no doubt his pleasure, to support her in the style befitting their station in life; and there is no evidence of his having, at any time during their married life, done or said anything from which it could even be inferred that he expected his wife to pay him for the keep of the live stock, which was her separate property, kept on his place. The court, under the circumstances, was justified in holding that appellants were not entitled to recover anything on the set-off. The sum awarded appellee represents the fair cash value of the rents received by her husband for her lands, during his life and after the execution of the marriage contract.

Nor can the plea of the statute of limitation avail, for the reason that section 2525, Kentucky Statutes, expressly provides that limitation does not run against a married woman until the disability of coverture is removed, and then she has the same time within which to prosecute her suit as she would have had were she unmarried when the cause of action accrued. The purpose of this section of the statutes was to prolong, in favor of married women and all other persons under disability therein designated, the several periods of time prescribed in the statutes within which an action must be

commenced. The Weissinger act had the effect of enlarging, but did not restrict, the powers of married women. It removed all of the disabilities of coverture imposed by the common law in the matter of contracting with other persons, the husband included, subject to the restrictions specified in the statute. *Coleman v. Coleman*, 143 Ky., 36. In *Sturgill v. C. & O. Ry. Co.*, 116 Ky., 659, it was held that the Legislature did not, by the enactment of section 2128, Kentucky Statutes, defining the rights and powers of married women, intend to remove all of the disabilities of coverture, and among such disabilities may be enumerated that which prevents the running of the statute of limitation against them during their coverture. Appellee's cause of action not having accrued until after the death of her husband, the trial court correctly held the plea of the statute of limitation presented no defense.

The evidence abundantly supports the judgment, and it is, therefore, affirmed.

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### **Letton's Admr., et al. v. Rafferty, et al.**

(Decided June 5, 1913.)

#### **Appeal from Nicholas Circuit Court.**

1. **Execution—Joint Judgment—Validity of Execution Against Survivor Alone—Section 405, Civil Code.**—Where one of two joint judgment debtors is dead an execution against the survivor alone is valid as to him.
2. **Execution—Validity of Execution in Excess of Judgment Debt.**—An execution which fails to allow a credit shown on the judgment is not void, but may in a proper proceeding be quashed to the extent of the excess only.
3. **Mortgages—Payment by Third Party Without Assignment—Lien.** One who pays off a mortgage without taking an assignment acquires no lien.
4. **Limitation—Payment of Mortgage.**—The claim of one discharging a mortgage without taking an assignment is barred by the five year statute of limitations.

SWINFORD & SWINFORD and MORGAN & DARRAGH for appellants.

WILLIAM CONLEY, JOHN P. MCCARTNEY and HOLMES & ROSS for appellees.

## OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.

In April, 1883, James E. Letton's Executor recovered in the Nicholas Circuit Court a judgment against Pat Rafferty and Mike Rafferty. This judgment was credited by certain sums arising from the sale of land and the further sum of \$116 paid March 1, 1883. Several executions were issued on the judgment. The last execution before the one sought to be enjoined in this action was issued April 22, 1897, and returned "No property found" on April 23, 1897. In the month of January, 1912, an execution was issued by the clerk of the Nicholas Circuit Court against Pat Rafferty alone. The clerk failed to endorse on the execution the credit of \$115 paid March 1, 1883. The execution was levied on certain lands in Nicholas County held in the name of Pat Rafferty.

Pat Rafferty brought suit to enjoin the collection of the execution. His wife, Jennie Rafferty, asserting ownership of part of the land levied on and claiming that it was held in trust for her by her husband, brought separate suit for the same purpose. The two suits were consolidated. They both claim that the execution sought to be enjoined was void because the judgment on which it issued was a joint judgment against Pat Rafferty and Mike Rafferty, whereas the execution was issued against Pat Rafferty alone; also for the further reason that the execution was for a sum in excess of the judgment debt. Plaintiffs asked that the execution be quashed on both grounds. Defendants moved the court to be permitted to have the execution amended so as to show the credit of March 1, 1883, and to show that the execution was issued on the judgment against Pat Rafferty and Mike Rafferty. They also filed an answer, in the second paragraph of which they pleaded that the judgment against Pat Rafferty and Mike Rafferty in favor of James E. Letton's Executor was the only judgment in the Nicholas Circuit Court or any other court against Pat Rafferty in favor of James E. Letton's Executor or James E. Letton, deceased; that at the time of the issuance of the execution sought to be enjoined Mike Rafferty was dead and had been dead for several years; that his estate was hopelessly involved at the time of his death, and that no administration was ever had or applied for on his estate; and that there had never been and was not then a personal representative of the estate of Mike Rafferty. It

is further alleged that the execution showed by endorsement thereon that it was issued on the judgment which was rendered at the March term of the Nicholas Circuit Court in 1883. The trial court refused to permit the execution to be amended and sustained a demurrer to the second paragraph of defendant's answer. On final hearing the execution in question was adjudged to be void, and plaintiffs were granted the relief prayed for. From that judgment this appeal is prosecuted.

Subsection 2 of section 1652 Ky. Stats., provides that on a joint judgment against several, execution must be joint. Section 405 of the Civil Code provides that the death of a defendant shall not prevent the issuing of an execution against a surviving defendant. The defendants contend that under subsection 2, section 1652 Kentucky Statutes, the execution against Pat Rafferty alone was void although Mike Rafferty was dead at the time it issued. In support of this position we are cited to the cases of *Tanner v. Grant*, 10 Bush, 363 and *Peoples Bank of Kentucky, Assignee v. Barbour*, 30 K. L. R., 712.

The question is, what effect shall be given to the Code provision? The case of *Tanner v. Grant*, *supra*, was based on the statute providing that on a joint judgment against several, execution must be joint. There was a joint judgment against Tanner and Ramey, though Ramey was living at the time execution issued Tanner alone. It was held that the execution was void. In the case of *Peoples Bank, &c. v. Barbour*, *supra*, it was held that an execution against one who was dead was void as to him. In discussing the question, the court used the following language:

"In 1 Freeman Executions, section 36, it is said: 'When one of several judgment defendants dies, satisfaction may be sought solely by seizing the persons or levying on the personal estate of the survivors, in which cases no *scire facias* is needful to authorize the issue of execution. But it is otherwise if the heir of the deceased is to be pursued. In order that the execution may conform to the judgment, it issues against all the defendants, although it, for all practical purposes, amounts to no more than an execution against the survivors.' (See to same effect note to *Hatcher v. Lord*, 61 L. R. A., 387.)

"Under these authorities the execution which issued on April 13, 1903, was only an execution against the survivors. It was not an execution which had any legal vitality as to Richard N. Barbour. Being void as to



him, it was a nullity so far as his estate was concerned, and being nullity as to him, it did not stop the running of the statute of limitations."

In that case the court simply referred to the usual form in which executions are issued, but did not hold that if that form was not followed, the execution was void. In the case under consideration the execution sought to be enjoined was issued on the joint judgment against Pat and Mike Rafferty. There is no question as to the identity of the judgment or of the execution. Had the execution issued against both Pat and Mike Rafferty, it would have been void as to Mike, who was dead, though still binding on Pat. We fail to see by what principle of justice Pat Rafferty may complain because the clerk did not do a void thing, which, if it had been done, could have in no way affected his rights. Formerly section 405, which was section 435 of the old Code, read as follows: "The death of part of the defendants shall not prevent execution being issued, which, however, shall operate alone on the survivors and their property." The language of the latter section might have been interpreted as requiring the execution to be issued against the dead as well as the living. The legislature must have meant something by changing this provision so as to read that "The death of a defendant shall not prevent the issuing of an execution against a surviving defendant." There is nothing in the latter section to indicate that in issuing the execution against a surviving defendant it must also be issued against the joint defendant who is dead. Indeed, it contemplates the issuing of such execution against the surviving defendant alone. While the fact that the execution issued against the dead defendant as well as the survivor would not affect its validity so far as the survivor was concerned, neither would its validity be affected by the fact that it issued against the survivor alone. To hold otherwise would permit an execution defendant to escape liability on a technicality altogether at variance with the modern conception of justice.

The execution of 1897 was not void because it failed to show the credit of \$116 paid March 1, 1883. In a proper proceeding it might have been quashed to the extent of the excess, but to that extent only. *Wiedemann v. Crawford*, 149 Ky., 202.

In the second paragraph of her original petition Jennie Rafferty alleged that she paid off a mortgage lien upon two of the tracts of land on which the execution was

issued, and claimed that her lien to this extent was superior to that of defendants. Defendants' demurrer to this paragraph was overruled. Thereafter, defendants pleaded the five year statute of limitation, to which plea a demurrer was sustained. It does not appear that Jennie Rafferty took either an assignment of the mortgage or the notes. She did not, therefore, acquire any lien on the land, and any claim that she may have had was necessarily barred by the five year statute of limitations. *Duke v. Pigman, &c.*, 110 Ky., 756.

No other question is passed on.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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### **Louisville & Interurban Railroad Company v. Hardin's Admr.**

(Decided June 6, 1913.)

#### **Appeal from Oldham Circuit Court.**

1. Evidence—Action Against Railroad for Death—Manner of Death May Be Established by Circumstances—Negligence.—Although no witness saw the deceased when he was killed, the fact that he was killed in a certain way may be established by circumstances as fully as by direct testimony.
2. Instructions—Contributory Negligence.—It is unnecessary that in the first instruction anything should be said as to contributory negligence, when in another instruction the jury is told that although the defendant was negligent as set out in No. 1, there could be no recovery if the deceased was guilty of contributory negligence but for which he would not have been injured.
3. Railroads—Electric Railroad—Injury to Conductor—When Not Required to Anticipate Presence of Pole.—A conductor upon an electric line is not required to anticipate that a pole has been set so close to the track as to endanger him in the ordinary discharge of his duties and he does not assume the risk unless he knows the dangerous proximity of the pole.

**WILLIS, TODD & BOND** and **A. P. HUMPHREY** for appellant.

**O'DOHERTY & YONTS** for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—**  
**Affirming.**

William H. Hardin was a conductor on one of the cars of the Louisville & Interurban Railroad Company be-

tween Louisville and LaGrange. While acting as conductor he was killed near Pewee Valley, and this action was brought by his personal representative to recover for his death on the ground that the company had negligently placed one of its poles too close to the track and that in the discharge of his duties Hardin had been struck by this pole and killed. By its answer the defendant denied the allegations of the petition, and pleaded contributory negligence on the part of the deceased. On a trial of the case there was a verdict and judgment for the plaintiff in the sum of \$5,000. The railroad company appeals.

According to the evidence for the plaintiff as the cars approached the station at Pewee Valley, it was customary for the conductors to change the trolley from one wire to another for the purpose of enabling the east bound car to pass the west bound car at that station; and it was customary for the conductors in doing this while the cars were approaching the station to go around the bumper at the rear end of the car and stand on the bumper and adjust the trolley. The bumper of the car was so constructed that the conductor could step from the platform on a portion of it, and thence using the hand-holds proceed to that portion of the bumper immediately underneath the rear windows, and while standing upon this part of the bumper, which was from ten to twelve inches wide adjust the trolley while holding to the hand-holds. The pole in question stood thirty-eight inches from the nearest rail of the track. The car extended over the rail nineteen inches. This would leave only about nineteen inches between the pole and the side of the car as it passed. The accident occurred about six thirty p. m. on August 18, 1911. As the car approached Pewee Valley there were a number of people standing on the rear platform. Clarence Netherton testified that he saw Hardin go inside and get his gloves, and put them on. These gloves were used when they were going to change the trolley; that he then came out on the back platform, and went around to the right, and this was the last he saw of him. Norman Blackley testified that he was sitting on the steps of the car on the right hand side; that the rear platform was filled with passengers; that while he was sitting on the steps and as the car was approaching Pewee Valley, Hardin touched him on the shoulder indicating that he wished him to arise; that he arose and moved out of the way, and he then saw Hardin step down

upon the first step of the car and take hold of the hand hold nearest the platform; that he then turned away and heard a noise that attracted his attention, and on looking back saw Hardin flash behind the hind end of the car with his face down. J. H. Bowling was sitting in the car and his attention was attracted by a jar against the car and the lights twinkling above the globe. The car suddenly stopped. He and P. S. Head got off the car and went to the place where the body of Hardin lay, and from this point they went to the pole. On the painted portion of the pole about an arm's length above his head, he saw a blur on the paint, and noticed that the projections of wood made by the spikes of the linemen in climbing the pole, had been knocked off and appeared to have been freshly broken. P. S. Head testified that there was a noise like a bump; then there was a general outcry. He got off the car after it stopped, and ran back to where the man was lying. He found the body about twelve feet from the pole; he testified to the same facts as Bowling as to the signs on the pole. The physician who examined Hardin testified that he had received a severe blow on the back of the head at the base of the skull. There was a fracture at the base of the skull about the hair line. Either his neck was broken or the base of the skull.

It is insisted for the appellant that this evidence does not show that Hardin was struck and killed by the pole and that on this evidence it is equally probable that he fell from the car and was killed in this way without striking the pole. But it will be observed that he went in the car to get his gloves which were commonly used by the conductors while adjusting the trolley; that he came out of the car and had Blackley to get up from the steps on the south side of the car; that he was next seen with his hand upon the handhold nearest the platform at the south side of the car, and that none of the witnesses saw him after this; that next came a bump and a violent shaking of the car, and that just after this Hardin's body suddenly flashed out behind the car, and when he was reached he had received a heavy blow at the back of the head which broke his neck or fractured the skull; and there was practically no other injury upon him except some cratches on his face received when he fell on his face. It is evident he passed out of view of the witnesses because he passed around the corner of the car and just after this came the thud or bump. If he was standing on the bumper holding to the handhold with one hand and

trying to adjust the trolley with the other, he would naturally have his eyes to the rear so that he could see the trolley which he was trying to adjust and this would throw the back of his head toward the pole; his head would naturally be thrown outward in the effort to see the trolley and adjust it. While it is true no witness saw him strike the pole the circumstances are fully as convincing as any positive testimony could be; for there is nothing else in the record to account for the bump, the jar of the car or the twinkle of the lights.

It is true that on behalf of the defendant a number of witnesses were introduced who testified that Hardin's body was found from twenty to forty feet east of the pole. But we do not regard this fact as entitled to much weight for the reason that being a stout young man, having his hand gripped tightly upon the handhold when the car was running rapidly, he would not unreasonably be carried some feet beyond the pole before his grip upon the handhold relaxed. We, therefore, conclude that not only there was some evidence that Hardin was struck and killed by the pole but that the weight of the evidence sustains the verdict of the jury.

It is complained that in the first instruction, the court did not say anything about contributory negligence; but while this is true, the court by another instruction, told the jury that although they might believe from the evidence that the defendant was guilty of negligence as set out in instruction 1, yet if they further believed from the evidence that the deceased failed to use ordinary care for his own safety, and but for this would not have been hurt, they should find for the defendant. The instructions of the court are to be read together, and when the court expressly referred in this instruction to No. 1, the jury could not have failed to understand the meaning of the two instructions.

Lastly, the appellant complains that the following instruction asked by it was refused:

"If the jury believe from the evidence that the deceased knew of the proximity of said pole or if it was patent to persons of his experience and understanding, they should find for the defendant."

If this instruction had been given it would have been under the evidence misleading. It was not incumbent on the deceased to anticipate that a pole had been placed so near the track as to endanger him in the proper and usual discharge of his duties, and he was not required to be on

the lookout for such a pole. He had a right to presume that he could safely discharge his duties in the ordinary way unless he knew of the danger. The fact was, however, the pole was there and it was patent to a person of his experience and understanding if he had looked. He did not look because he did not realize the danger, and as the car approached the pole had his back to it with his eyes on the trolley. The instruction was, therefore, properly refused, and without going into the details of the evidence we deem it sufficient to say that if a proper instruction on the subject had been given it would have had no effect on the result of the trial. The defendant was clearly negligent in maintaining its pole so close to the track, and to exempt it from responsibility on the ground that the deceased assumed the risk, it should appear that he knew of the proximity of the pole and that the danger from it was patent to a person of his experience and understanding. There was much in the evidence for the defendant to the effect that the deceased was negligent in going outside of his car while in motion to change the trolley; but this issue was fairly submitted to the jury by the instructions of the court, and on the whole record we conclude that the appellant had a fair trial on the merits of its case.

Judgment affirmed.

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### Beasley, et al. v. Furr.

(Decided June 6, 1913.)

#### Appeal from Garrard Circuit Court.

1. Judgment—Vacation of—New Trial.—A judgment will not be vacated or a new trial granted after the term at which it was rendered, except upon the grounds, or some of them, provided by section 518, Civil Code, and where a petition for the vacation of such judgment and new trial and the record of the action in which the judgment was rendered made a part of the petition, show that the petitioner was duly summoned in the first action and had ample opportunity to make defense, the judgment will not be set aside or a new trial granted upon the mere allegation that the debts sued on had been paid before the judgment was rendered; there being no fraud alleged in the procurement of the judgment.
2. Judgment—Petition for Vacation of—Conclusion of Pleader.—The allegation that the petitioner did not discover that the judg-

ment had been rendered until after the term at which it was entered, and that he could not by reasonable diligence have sooner discovered the fact, is a mere conclusion of the pleader, and is disproved by the admissions of the petition and the record in the former action; therefore, a demurrer to the petition was properly sustained.

R. H. TOMLINSON for appellants.

H. CLAY KAUFFMAN, H. L. WALKER for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

In the summer or fall of 1912, appellee sued appellant in the Garrard Circuit Court upon two notes, one of \$219 and the other \$133.35. The larger note was secured by a mortgage on three small parcels of land situated in Garrard County, and the small note by a second mortgage on two of the three parcels of land covered by the first mortgage. In addition to asking a personal judgment on each of the notes, appellee also sought in the action, the enforcement of the mortgage liens in satisfaction thereof. A summons was duly issued and served upon appellant, and at the succeeding term of the court appellee obtained a personal judgment against him for the amount of each note with interest, and also for the enforcement of the mortgage liens in payment thereof. After the judgment was rendered, appellee by an entry on the record of his judgment, acknowledged payment of the larger note and satisfaction of the judgment to that extent. Thereafter, the master commissioner of the Garrard Circuit Court sold in satisfaction of the remainder of the judgment or small note, the two parcels of land embraced in the second mortgage, and appellee became the purchaser thereof at, substantially, their appraised value. The sale was reported to the court and confirmed, after certain exceptions filed thereto by appellant had been overruled. By order of the court, the commissioner made appellee a deed conveying him the lots and he thereafter obtained possession of them under a writ of *habere facias possessionem*.

After these proceedings were had, appellant instituted the present action by filing in the Garrard Circuit Court his petition asking the vacation of the judgment recovered against him by appellee and that he be granted a new trial in the action in which it was recovered. The circuit court being of opinion that the petition did not present sufficient cause for vacating the judgment, or for

the granting of a new trial, upon any of the grounds authorized by section 518, Civil Code, sustained a demurrer thereto and dismissed the action, and from the judgment manifesting these rulings, this appeal is prosecuted.

The only grounds set forth in the petition for the relief sought are, that the debts sued on in the action brought by appellee had been fully paid before the action was instituted, that he was not aware of the failure of appellee to give him credit for the payments he had made thereon, until after the rendition of the judgment, and could not by reasonable diligence have discovered such failure before the judgment was rendered. These averments are contradicted by the appellant's own conduct and disproved by the record in the action in which the judgment was recovered, which was filed with appellant's petition. It is inconceivable that, after being duly summoned in the action upon the notes and to enforce the mortgage liens, appellant would have allowed judgment against him by default, if the notes had been paid before the action was brought. It is not alleged in his petition that the judgment was obtained by fraud or that he was prevented from making a defense in the action by any thing done by appellee, and the allegation that he could not by reasonable diligence have discovered appellee's alleged failure to credit him with payments that discharged the debts, is a mere conclusion. Receiving as he did notice of the suit, through the service of a summons, he had ample time to discover that he had not been given the alleged credits, and ample time to have made defense to the action, but instead of doing so he suffered judgment to go against him. There was no showing of his having been prevented by accident or unavoidable casualty, from making a defense, and, moreover, the record of the former action, made a part of his petition, shows that he satisfied the larger note after the judgment was rendered, by conveying appellee one of the tracts of land covered by the first mortgage. These facts alone show that the debt had not been paid before the action was brought. In brief, the petition not only fails to show reasonable diligence on the part of appellant to inform himself of the object of the former action, or to discover that he had not been credited with what he had paid on the notes, but it also fails to show that he had, or can yet make, a good defense to the action. This being true he failed to show cause for vacating the judgment or for a new trial,



as authorized by section 518, Civil Code. It therefore follows that the circuit court did not err in sustaining the demurrer to the petition.

Judgment affirmed.

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**Anderson, et al. v. Herring, et al.**

(Decided June 6, 1913.)

**Appeal from Garrard Circuit Court.**

1. Wills—Construction of.—A devise by a testator, after payment of his debts, of all his estate to his wife for life, with remainder to his daughter, with a proviso, that if the wife remarried the property should be divided between her and the daughter, as the law directs, but that if the daughter should die "without heirs," the estate should go to the testator's "family relations" after the death of the wife, gave to the daughter a defeasible fee in the property devised, subject to the life estate of the widow and subject to be defeated in the event, she (the daughter) should die without children, before the termination of the particular estate; that is, before the death of the widow. As the daughter survived the widow, her title became an absolute or fee simple title.
2. Wills—Construction of.—It is a well recognized rule in the construction of wills, that where an estate is devised to one for life, with remainder to another, with the further provision that, if the remainderman should die without children or issue, then to a third person, the words, "dying without children or issue," are restricted to the death of the remainderman before the termination of the particular estate.

R. H. TOMLINSON for appellants.

L. L. WALKER for appellees.

**OPINION OF THE COURT BY JUDGE SETTLE—Affirming.**

Daniel M. Anderson died at his home in Lancaster, Garrard County, in January, 1878, survived by his wife, Nannie Anderson, and their only child, Eliza Anderson, who later became the wife of Fisher Herring. On the 3d day of January, 1878, Daniel M. Anderson made a will which, shortly after his death, was duly admitted to probate by the Garrard County Court. The testator's widow, Nannie Anderson, appointed by the will executrix without security, duly qualified as such.

The will, omitting the signatures of the testator and attesting witnesses, is as follows:

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"I. Daniel M. Anderson of the town of Lancaster, county of Garrard and State of Kentucky, do make and ordain the following as my last will and testament. 1st. I will and direct that all my personal property shall be sold, and all my debts and burial expenses be paid, and if there shall be *lack means* after said sale to pay said debts and expenses, the deficit is to be raised by renting out the lands belonging to *myself wife*. 2nd. After the payment of my debts as above directed, I then will and bequeath unto my wife, Nannie Anderson, all my property, both real and personal during her life time or widowhood, and if she should marry, my estate is then to be divided between my wife and my child, Eliza Anderson, as the law directs. 3d. If my child Eliza Anderson should die without heirs, then I will that all my real estate shall be divided among my own family relatives after the death of my wife, Nannie Anderson. 4th. I hereby appoint my wife, Nannie Anderson, as the executrix to this my last will and testament. And I hereby order and direct that my said wife shall be permitted to enter and act as executrix to this will and testament without any other security than her individual bond."

The testator's widow, who did not again marry, took possession of and enjoyed the estate devised until her death which occurred February 17, 1903. The character and value of the personal property is not shown by the record, but the real estate consisted of the family residence in Lancaster and two tracts of land in Garrard County; one containing thirty eight acres and the other two hundred and twenty acres. Upon the death of the widow the whole of the estate went into the hands of the daughter and has since been held and enjoyed by her.

In order that her rights under the will might be determined, Eliza Herring and her husband brought this action in equity for a construction of that instrument, making defendants such of the testator's family relations as would have taken the estate under the will at the marriage or death of the testator's widow, had the daughter died without issue before the marriage or death of the widow.

It was, in substance, alleged in the petition that by the second clause of the testator's will his estate, except such of the personalty as might have been necessary to pay his debts, was devised the widow for life or during her widowhood, with the proviso, that in the event of her remarrying, it should be divided between the widow

and the daughter as directed by the statute of descent and distribution; but that if the widow remained single, the estate at her death should go absolutely to the daughter, if then living, or, if not then living, to such child or children as she might have left surviving her, but, if none, then to the family relations of the testator, as provided by the third clause of the will.

It was further alleged in the petition that some of the family relations of the testator, made defendants to the action, were without right claiming an interest in the estate devised, as remaindermen, which necessitated a construction of the will. It will be seen from the averments of the petition that Eliza Herring claims a fee simple title in and to the real estate devised by her father's will; that is, that she took under the will the fee subject to the life estate of her mother, Nannie Anderson, and subject to be defeated in the event that she (Eliza Herring) should die childless before her mother; and that the death of the latter converted her (Eliza Herring's) title to the estate devised from a defeasible into an absolute fee.

This contention of the appellees' was sustained by the circuit court, hence appellants' demurrer to the petition was overruled and upon their refusing to plead further, judgment was entered declaring that appellee Eliza Herring

"took an absolute fee simple title to the land herein set out at the death of her mother, Nannie Anderson, under the will of said Daniel M. Anderson, and she now has a fee simple title in and to said property, and the defendants have no interest whatever in same; and it is adjudged that plaintiffs' title to said land be quieted."

Appellants' dissatisfaction with that judgment resulted in this appeal.

We think it manifest from the language of the will that the testator's wife and daughter were equally the objects of his bounty; it being his intention that the former should enjoy the property devised during her life or widowhood, but if she should marry, that it be divided between her and their daughter as authorized by the statute of descent and distribution of this State. Furthermore, that if the daughter should die without children before the death of the widow, the property should, in that event, go to and be divided among the appellants, who are the testator's family relations, but that if the daughter should be living at the time of the widow's

death, she should, in that event, take a fee simple title to the devised estate. That such was the testator's meaning is apparent from the second and third clauses of the will. The second clause provides, that if the widow should again marry, the testator's estate should be divided between the widow and daughter as the law directs. In the third clause the testator had in contemplation the death of the daughter without issue, before that of the widow, hence he therein provided that the property should, in that event only, be divided among his family relations, "after the death of my wife Nannie Anderson." It is patent, therefore, that the appellee, Eliza Herring, took under the will of her father a defeasible fee in the estate devised, subject to the life estate of her mother, the testator's widow, and subject to be defeated in the event she, Eliza Herring, should die without children before the termination of the particular estate, that is, before the death of the widow. This being so, it necessarily follows that as appellee survived the widow, upon the death of the latter, her title to the estate devised became an absolute or fee simple title.

The rule of construction we here apply is one that has long been recognized in this jurisdiction. Indeed, it received the approval of the court as far back as 1837, in the case of *Birney v. Richardson*, 5 Dana, 432, as the following excerpt from the opinion will show:

"And in such a case, the simple unexplained words 'dying without issue,' will, according to a general and well established rule, be construed as meaning the death of the legatee after that of the testator, and before the time for distribution, or when the legacy may be reduced to possession.

"And in such a case, the law will not incline to any other conclusion, than that the death must be during the particular estate, unless the letter or context of the will plainly shows, that the testator intended a death either in his own life time, or at any time whenever it might occur." Perhaps the latest statement of this rule from this court is to be found in the case of *Wilson v. Wilson, &c.*, 151 Ky., 637, wherein it is said:

"While no fixed rule has been, or can be, adopted as a guide to courts in the construction of wills, for the simple reason that no two wills are exactly alike, still certain general principles have been announced, which serve to guide or aid the court in arriving at the testator's intention. These general rules or principles are admirably

stated in *Bradshaw v. Williams*, 140 Ky., 160, where the court says: 'While the purpose of construing a will is to arrive at the intention of the testator, yet, in seeking the intention of the testator, we must construe the language of the will in the light of the uniform rules of interpretation adopted by this court. Among the rules so adopted is one to the effect that where an estate is devised to one for life, with remainder to another, with the further provision that, if the remainderman should die without children or issue, than to a third person, the words 'dying without children or issue,' are restricted to the death of the remainderman before the termination of the particular estate.' "

An examination of the following additional authorities, will show them to be in entire accord with those from which we have quoted: *Pool v. Benning*, 9 B. Mon., 623; *Thackston v. Watson*, 84 Ky., 209; *Ferguson v. Thomason*, 87 Ky., 324; *Harvey v. Bell*, 118 Ky., 521; *Reuling's Extx. v. Reuling, &c.*, 137 Ky., 639; *Bradshaw v. Williams*, 140 Ky., 163; *Duncan v. Duncan*, 150 Ky., 825.

As we fully concur in the circuit court's construction of the will of Daniel M. Anderson, the judgment is affirmed.

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## **Louisville & Nashville Railroad Company v. Commonwealth.**

(Decided June 6, 1913.)

### **Appeal from Bell Circuit Court.**

1. **Appeal—New Trial.**—No error committed during a trial is available upon appeal, unless it has been relied upon as a ground for a new trial.
2. **Railroads—Blocking Frogs.**—Under section 780 of the Kentucky Statutes, which requires every railroad company to block the frogs on its track, the statute is violated when the company fails to block any one of its frogs.
3. **Evidence—Incorporation—How Shown.**—In order to show, that the defendant is a corporation created under the laws of this State, it is only necessary to show the de facto existence of such corporation; and that may be established by evidence tending to show that it acted and was accepted in the community as a corporation under the name alleged.

4. **Evidence—Judicial Notice.**—Under section 1624 of the Kentucky Statutes, which requires the courts of this State to take judicial notice of the acts of the General Assembly, the courts will take judicial notice that a corporation created by legislative act, is a corporation.
5. **Judgment—Former Conviction.**—A plea of former acquittal or conviction will avail as a bar whenever the facts charged in the second indictment would, if proved, have prevented a legal conviction upon the prior indictment under which the prisoner has been acquitted or convicted.

C. W. METCALF and B. D. WARFIELD for appellant.

JAMES GARNETT, Attorney General, O. S. HOGAN, Assistant Attorney General and J. G. FORRESTER for appellee.

OPINION OF THE COURT BY JUDGE MILLER—Affirming.

The appellant was indicted at the November term of the Bell Circuit Court, under section 780 of the Kentucky Statutes, for its failure to block a frog of its railroad track at a point on its main track in Middlesboro opposite a building formerly occupied by the Norton Hardware Company, so as to prevent the feet of its employes from being caught in said frog. Upon a trial, the jury imposed a fine of \$100; and from the judgment upon that verdict, the defendant appeals.

In its brief, appellant assigns three grounds for a reversal; (1) the trial court erred in permitting witnesses for the Commonwealth to testify that appellant was a corporation; (2) defendant's motion to require the jury to find for it upon the evidence should have been sustained because, it is claimed, the evidence shows that the frog referred to in the indictment and in the testimony was not the property of the defendant, but was the property of the Virginia Iron, Coal and Coke Company; and (3) the court erred in overruling defendant's plea of former conviction.

1. It would be a sufficient answer to the first error suggested to point out the fact that this alleged error was not made a ground for a new trial, and cannot, therefore, be considered upon appeal. It is a well settled rule of this court, that no error committed during the trial is available upon appeal, unless it has been specifically relied upon in the grounds for a new trial. *Hatfield v. Adams*, 123 Ky., 422; *Acme Mills & Elevator Co. v. Rives*, 141 Ky., 786; *City of Frankfort v. Buttmer*, 146 Ky., 818.

Furthermore, the evidence was competent. In order to show that the defendant is a corporation created under the laws of this State, it is only necessary to show the *de facto* existence of such corporation; and that may be established by evidence tending to show that it acted and was accepted in the community as a corporation under the name alleged. *Standard Oil Co. v. Commonwealth*, 122 Ky., 440; *Geo. H. Goodman v. Commonwealth*, 30 Ky. Law Rep., 519; 99 S. W., 252; *Morse v. Commonwealth*, 129 Ky., 312.

Furthermore, the court will take judicial notice that appellant is a corporation. In *M., H. & E. R. R. Co. v. Commonwealth*, 140 Ky., 258, we said:

“What evidence will be sufficient to sustain the allegation was pointed out in *Standard Oil Co. v. Commonwealth*, 122 Ky., 440. By section 1624, Kentucky Statutes, judicial notice is taken of acts of the General Assembly; and so where a corporation is created by legislative act, the court will take judicial notice that it is a corporation. *Cincinnati, et al., R. R. Co. v. Commonwealth*, 6 R., 306; *L. & N. R. R. Co. v. Commonwealth*, 11 R., 442. Judicial notice will not be taken of articles of incorporations filed in the office of the Secretary of state; but in view of the rights of railroad companies, and the statutes on the subject, it will, unless the contrary appears, be presumed that a railroad company is a corporation. All the provisions of the Kentucky Statutes regulating railroads are placed in the chapter on private corporations; and only corporations are authorized to condemn land for right of way, depot grounds and the like. It is universal to incorporate companies to own and operate railroads. A firm cannot well do the business. The court, therefore, did not err in refusing to instruct the jury peremptorily to find for the defendant, on the ground that the prosecution failed to introduce evidence that the defendant was a corporation.”

2. We cannot agree with counsel for appellant that the evidence clearly shows the frog mentioned in the indictment and in the testimony belonged to the Virginia Iron, Coal and Coke Company. While some of the testimony of the prosecuting witness, Slusher, is vague and uncertain, it is not susceptible of the interpretation put upon it by appellant. Moreover, the testimony of Bingham, the other prosecuting witness, is not subject to the criticism applied to Slusher's testimony. At most, it can only be said that the testimony upon this point is conflict-

ing; and there being testimony upon either side of the proposition it was for the jury to determine the disputed fact.

3. The indictment was found under section 780 of the Kentucky Statutes, which reads as follows:

"Before the first day of January, 1894, every company shall adjust, fix or block the frogs on its tracks to prevent the feet of its employees from being caught therein."

Section 793 of the Kentucky Statutes fixes the penalty as follows:

"Any company failing to comply with or violating or permitting any of its employees or agents to violate any of the provisions of sections 772, 773, 774, 775, 777, 778, 780, 781, 782, 786, 787 and 791 of this article shall, in addition to subjecting itself to any damages that may be caused by such failure or violation, be guilty of a misdemeanor and be find for each failure, or violation not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the circuit court of any county through which the company in default operates a line of road, or in the Franklin Circuit Court."

Thirty-one similar indictments were returned against appellant at the same term of the Bell Circuit Court; and upon a trial under the first indictment (No. 1025) appellant was, on February 4, 1913, found guilty and fined \$100. When the second indictment (No. 1026) on which this appeal was prosecuted, was called for trial on February 5, 1913, the defendant pleaded its former conviction under indictment No. 1025 in bar of the Commonwealth's right to prosecute it under indictment No. 1026. The circuit court, however, overruled the plea and it is claimed this was error.

The indictments specified separate and distinct frogs with sufficient certainty to show separate and distinct offenses. Section 793 of the Kentucky Statutes, above quoted, provides a penalty for "each failure or violation" of section 780. The statute is, therefore, broad enough in its terms to make the failure to block any frog a separate and distinct offense. It is quite true that if the Commonwealth had indicted the defendant generally for having failed to block its frogs without specifying any particular frog, a conviction would have been a bar to prosecutions for prior similar offenses. The case at bar, however, is quite different. Appellant takes the ground that since the statute does not require it to block "each



frog" but requires it to block "the frogs," it is merely a requirement that appellant shall block *all* of its frogs; and if it fails to block all of its frogs it will then be liable to a fine, not for each frog it has failed to block, but for its failure to comply with the statute by blocking all of its frogs. Under this rather unusual construction of the statute, appellant could in no event be made liable if it blocked one frog although it left the other thirty-one unblocked. Surely no such construction was ever contemplated by the legislature. The statute was passed for the protection of employees of railroads, and if we were to adopt the construction contended for by appellant, the protection thus afforded would be no protection. *Commonwealth v. I. C. R. R. Co.*, 21 Ky. L. R., 1342; 55 S. W. 10. It requires little argument or illustration to show that the offense for which appellant was found guilty under the indictment in this case (No. 1026) is not the same offense for which appellant was tried and found guilty under the first indictment. (No. 1025). In *Roberson's Criminal Law*, section 52, the rule is stated as follows:

"A plea of former acquittal or conviction will avail as a bar whenever the facts charged in the second indictment would, if proved, have prevented a legal conviction upon the prior indictment under which the prisoner has been acquitted or convicted. In such case the plea will be good though the offense be charged under a different name. The plea must state that the offenses charged in the two indictments are one and the same, or it will not be good."

Mr. Bishop says the offenses are not the same:

"First, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, secondly, when the evidence offered on the first indictment, and that intended to be offered on the second relate to different transactions, whatever be the words of the respective allegations; or, thirdly, when each indictment sets out an offense differing in all of its elements from that in the other, though both relate to one transaction; or, fourthly, when some technical variance precludes conviction on the first indictment but permits it on the second." 1 *Crim. Law*, Sec. 1051.

If on the trial of indictment 1025 the proof had described the frog mentioned in indictment 1026 the court would have been compelled to sustain a motion to find the defendant not guilty upon the ground that there

had been a fatal variance; and, under the rule above announced, this clearly shows that the two offenses are not the same. The cases relied upon by appellant are not in point and do not sustain its position.

In *Commonwealth v. Standard Oil Company*, 120 Ky., 724, the prosecution was against the company for failing to procure the annual license required of it by law; it was indicted for doing business without first having paid its annual license tax. Under that state of case there was but a single offense, not several offenses, since the offense consisted in failing to pay the license tax. The same is true of *Wilson v. Commonwealth*, 119 Ky., 769, where Wilson was indicted for practicing dentistry in violation of law. The offense there was a continuous one and entirely different from the case at bar. The case of *Cawein v. Commonwealth*, 110 Ky., 273, was similar to the case just referred to. In *Commonwealth v. Crowell*, 22 Ky. L. R., 1182; 60 S. W., 170, Crowell was indicted for maintaining a nuisance in several houses, each house being described in the indictment. It was contended that the indictment was bad for duplicity, in that the maintaining of a nuisance in each house was a separate offense. The only question decided was whether this plea was good, and the court merely held that the Commonwealth, if it so desired, might elect to lump all the offenses into one. It no where intimated that the defendant might not have been indicted for maintaining a nuisance in each house. And so here, if the Commonwealth had desired to do so it could have lumped all of these thirty-two offenses into one offense; but it also had the right to separate them into distinct offenses, as it did.

In *Snow v. United States*, 120 U. S., 274, the prosecution was for a violation of the polygamy law. Snow was indicted separately for living with three wives at the same time and the court very properly held that it was simply one offense under the statute, because polygamy consists of living with more than one wife. But, if instead of indicting him for polygamy, he had been indicted for adultery and each indictment had named a different woman, certainly he could not have pleaded a trial under one of the indictments as a bar to the trial of the others. Clearly the conviction of appellant under the first indictment for a specific offense was not a bar to its trial and conviction under the second indictment for a distinct and separate offense consisting of its failure to block a different frog.

Judgment affirmed.

**Birdsell Manufacturing Company v. Burgess, et al.**

(Decided June 6, 1913.)

**Appeal from Graves Circuit Court.**

**Action—Equitable Action to Subject Alleged Interest of Husband in Property of Wife to a Judgment Debt—Evidence—Finding of Chancellor.**—In an action to subject to a judgment debt an alleged interest of the husband in certain property, the legal title to which, is in the wife, held, the finding of the chancellor dismissing the petition is sustained by the evidence, it not appearing that any of the earnings of the husband went toward the payment of the property, and there being nothing in the evidence from which it may be fairly inferred that since the purchase of the property, the earnings of the husband have even been sufficient to support the family.

**MOORMAN & WARREN** for appellant.

**JOE W. BENNETT** for appellees.

**OPINION OF THE COURT BY JUDGE TURNER—Affirming.**

This is an equitable action by appellant against the appellees, R. T. Burgess and his wife, I. D. V. Burgess, seeking to subject to a judgment debt of appellant against R. T. Burgess an alleged interest of his in certain property in Mayfield, the legal title to which is in his wife.

The petition alleges that the defendant, I. D. V. Burgess, in 1902 bought certain real estate in Mayfield, Kentucky, at the price of \$1,850; that she paid in cash on the purchase price \$1,050, and executed purchase money notes for the balance; that since that time, she and her husband borrowed from a certain Building and Loan Association \$750 with which to pay off the balance of the unpaid purchase money; that this \$750 has all since been paid off by the defendant, R. T. Burgess, and that in addition thereto, R. T. Burgess has placed certain valuable improvements on said real estate which enhanced its value to the extent of at least \$300, and it prays to have the property sold, and the proceeds thereof belonging to R. T. Burgess applied to the payment of the judgment.

The defendants filed separate answers wherein they each denied that R. T. Burgess had paid any part of the Building and Loan Association debt, or had paid for any part of the improvements placed upon the property.

The defendant, I. D. V. Burgess, gave her deposition wherein she stated that she had inherited about \$2,500 from her father's estate some years before, and had at various times invested it in different ways, and that the \$1,050 paid on the Mayfield property was a part of the proceeds of the sale of some property elsewhere which she had bought with that money; she also stated that she had two grown daughters who were working at Mayfield, and had been for several years, and that with her own money, and with the assistance she had received from the wages of these two daughters, she had kept up the weekly payments on the stock in the Building and Loan Association, and that the same is about matured, and the mortgage debt practically paid off.

This evidence is corroborated by the elder daughter, and there is no other witness in the case on this issue.

It no where appears from the evidence that one dollar of the money or earnings of appellee, R. T. Burgess went toward the payment of the property in the first place, or toward the payments on the Building and Loan Association stock, or into the improvements. It appears further that R. T. Burgess is not a strong and vigorous man, and is only able to work a part of the time. There is nothing in the evidence from which it may fairly be inferred that his earnings since the purchase of the Mayfield property have been even sufficient to support his family.

The chancellor below properly dismissed appellant's petition.

Judgment affirmed.

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### **Newman v. Newman, et al.**

(Decided June 6, 1913.)

#### **Appeal from Floyd Circuit Court.**

1. Land—Action to Quiet Title—Deed—Lands Covered By—Evidence.—In an action by the father against his children to quiet title to a tract of land, evidence examined, and held that a deed, which the father made to his wife, covered the land in controversy.
2. Judgment—Estoppel.—Where, in an action by a father against his children to quiet his title to a particular tract of land, the children claim under a deed from their father to their mother covering the land in controversy and also other lands, they may confine their answer and counterclaim to the land in controversy,

and their failure to litigate with him the title to another tract of land, though embraced in their deed, does not preclude them from thereafter asserting title thereto in another action by him wherein, for the first time, the title is called in question.

JAMES GOBLE for appellant.

B. F. COMBS and SMITH & COMBS for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Plaintiff, R. H. Newman, brought this action against his son, William Newman, and his daughter, Lucy Tackett, to quiet his title to a tract of land containing 400 acres, more or less, and lying in Floyd County, Kentucky, on the waters of Clear Creek. Before answer was filed, William Newman died intestate, leaving a widow, Tilda, and three infant children, Teddy, Sadie and Lizzie May. The action was revived against them, and William Dingus appointed their guardian *ad litem*. On May 1, 1911, the widow, infants and their guardian *ad litem* filed a joint answer, denying plaintiff's title and alleging his possession to be that of a life tenant. They further averred that William Newman, at the time of his death, was the owner of nine undivided elevenths of the tract of land, one of which he inherited from his mother, and the other eight-elevenths of which he purchased from his brothers and sisters, all of which was subject to the life estate of the plaintiff. One-eleventh was admitted to belong to plaintiff. They further pleaded that their mother's title was derived by deed from the plaintiff to her, dated August 1, 1890, and recorded in the Floyd County Clerk's office, which deed, it is averred, covers the land in controversy. They also pleaded that plaintiff's title to the land in controversy was concluded by the proceedings in an action which he brought on October 21, 1904, against his children, wherein he sought to cancel the deed in question. The allegations of the answer were denied by reply, and plaintiff further averred that defendants were estopped by the proceedings in the suit referred to. During the progress of the action the Gibson Coal & Coke Company and W. F. White, claiming under the Cuyuga Coal & Coke Company, filed their intervening petition, asserting an undivided interest in the coal and minerals underlying the lands in controversy, by virtue of the purchase thereof from William

Newman and wife. On the final hearing the chancellor held that the title to the land in controversy was adjudicated in the case of R. S. Newman v. Elizabeth Newman and others, and that plaintiff was concluded by virtue of the judgment rendered therein. He also adjudged that the tract of land in controversy was a part of the tract of land mentioned and described in the deed of conveyance from R. H. Newman to his wife, Juda Newman. He further adjudged that the defendants were the owners of a ten-elevenths undivided interest in the tract in controversy, and that plaintiff was the owner of a one-eleventh undivided interest, subject to the life estate of plaintiff. Plaintiff's petition was dismissed and he appeals.

The consideration in the deed made by plaintiff, R. H. Newman, to his wife, Juda Newman, on August 1, 1890, was the natural love and affection which he had for his wife.

The property conveyed is described as follows:

"A tract or parcel of land situated on the left-hand fork of Beaver Creek, and at the mouth of Clear Creek, known as the old James Newman farm, containing six hundred acres more or less, and also all the property now belonging to the said R. H. Newman."

One of the questions to be determined is: Does this deed cover the land in controversy?

Prior to the year 1881, James Newman, Sr., owned and resided on a large boundary of land lying around the mouth of Clear Creek Fork of Left Beaver Creek in Floyd County. This tract extended about a mile along the line of Main Creek and about a mile up Beaver Creek. He also owned another farm further up on Clear Creek, known as the James Osborn farm, but not adjoining the home farm. In the year 1881, and just a short time prior to his death, he, by two deeds, conveyed all of his land to Rhoda Newman and R. H. Newman, two of his children. R. H. Newman is known as Hogan Newman. The deed to R. H. Newman was executed on July 1, 1881, and embraced that part of his father's home farm lying on Stillhouse Branch of Clear Creek. The deed to Rhoda Newman from her father was executed in October, 1881, and embraces all the remainder of the lands of James Newman, Sr. All the land conveyed to Rhoda was conveyed to her for life with remainder to R. H. Newman. Under the deed to her Rhoda acquired title to the remainder of the James Newman home farm, and also to

the James Osborn tract lying further up on Clear Creek, but not adjoining the farm around the mouth of the creek. After the death of James Newman, Sr., his other children assailed the conveyances to R. H. and Rhoda Newman, on the ground of fraud and undue influence. The action was compromised and Rhoda and R. H. Newman conveyed to their brother, James Newman, Jr., that part of Rhoda's boundary lying on Oldhouse Branch and on Main Clear Creek, immediately above and adjoining R. H. Newman's Stillhouse Branch boundary. Thereafter, Rhoda ascertained that her deed gave the remainder in her land to her brother, R. H. Newman. Upon ascertaining this fact, she sued her brother R. H. Newman, and one Morgan Turner, to whom R. H. had sold part of it. In this suit she sought a correction of the deed from her father, and to recover possession of the parts of the land which she claimed had been taken from her by virtue of a forged title bond. While this suit was pending, R. H. Newman executed to his wife the deed above referred to. After making the deed to his wife, R. H. and Rhoda Newman settled their law suit. By this compromise Rhoda got all the land in fee simple below a line called the Rhoda Newman conditional line, running across the farm at the mouth of Clear Creek. Plaintiff got in fee simple the land lying above this conditional line on the Main Creek, and by Clear Creek, to the lower end of the Stillhouse Branch boundary of the tract in controversy. Juda Newman died intestate in the year 1896, leaving eleven children. William Newman, one of her children, bought the interests of nine of his brothers and sisters, and executed a contract to convey the minerals therein to the Gibson Coal & Coke Company and the Cuyuga Coal & Coke Company. One of the children of Juda Newman died, and his interests was inherited by R. H. Newman.

In the year 1899, R. H. Newman brought a suit against his children to set aside the deed in question on the ground that it was made to defraud his creditors. This suit was dismissed.

In 1904, he filed a second suit against his children to quiet his title to the boundary now in controversy. The children answered, claiming that the land was covered by the deed to their mother. Thereupon he filed an amended petition, alleging that his attorney made a mistake in describing the Stillhouse Branch property in his original petition, and asking that his title be quieted

to other lands than those set out in the original petition. His children answered, pleading the deed to their mother, and claiming title thereunder. He based this action on fraud and misrepresentation of his wife, Juda Newman, and her brother-in-law, W. H. Stewart. In giving his deposition in that action, he stated that there was a state of lawlessness existing on Beaver Creek on the day of the deed, and he wanted to leave that community and go into another state, because he thought he was in danger. He therefore made a conveyance to his wife so that she might be able to sell and convey the land and come to him in another state when he had selected a home there. This action was dismissed by the trial court, and on appeal to this court the judgment was affirmed. *Newman v. Newman, et al.*, 124 S. W., 828. The court, in its opinion, said:

"In view of the many different statements made by appellant as to why he conveyed this land, as to what the consideration was, and the length of time which had elapsed from the making of the deed, we are of the opinion that the lower court did not err in dismissing his action."

As to the land embraced by the deed of plaintiff to his wife, Juda, the evidence for the plaintiff is as follows: Plaintiff said that the Stillhouse Branch property was no part of the land conveyed to his wife. Nelson Akers, a tenant, testified that Juda Newman did not claim the land, and that the deed does not cover the land in controversy. Catherine Akers, a daughter of Juda Newman, testified that the deed does not embrace the land now in controversy, and that her mother did not claim it. Kate Banks says that plaintiff got the land from his father, who lived on it at the time. His father lived at the mouth of Clear Creek. That part of the farm was known as the "old James Newman farm," while the tract in controversy was known as the "Hogue Newman farm." She also says that the deed in question does not cover the land in controversy. Ham Reynolds testified that since James Newman conveyed to Hogue Newman, the tract in controversy has been known as the "Hogue Newman farm." On cross examination he stated that the Stillhouse Branch tract (the land in controversy) was a part of the old James Newman farm before he deeded it to Hogue. F. C. Reynolds says that he heard Juda Newman say after she got the deed: "I have no more claim over it than you have."



On the other land, the evidence for the defendants is that the tract of land in controversy was a part of the old James Newman farm. Some time after R. H. Newman made the deed to his wife a deputy sheriff went to his house to collect an execution against him. Mrs. Newman asserted ownership of all the land and personal property, and forbade any levy thereon. Plaintiff also told the sheriff that he had no property whatever. The sheriff is corroborated by James Newman, a son of plaintiff. It further appears from various witnesses that plaintiff told them that he had made the deed to his wife to avoid the payment of his debts. There is also evidence to the effect that when requested by a party to go on his bond, he stated that he could not do so because he had no property of any kind.

It clearly appears from the evidence that James Newman, Sr., owned two tracts of land, one his home farm lying at the mouth of Clear Creek, and the other the James Osborn tract lying further up on Clear Creek and some distance away. There can be no doubt that the land in controversy is a part of the home farm. The fact that after it was deeded to plaintiff it was called the Hogue Newman farm is not very material. It may also be true that the part which Rhoda got was known as the Rhoda Newman farm. But the fact, nevertheless, remains that both tracts were known as the old James Newman farm. Furthermore the deed itself describes the land as "a tract or parcel of land situated on the left hand fork of Beaver Creek, at the mouth of Clear Creek, known as the old James Newman farm, containing 600 acres, more or less," and further adds "and also all the property now belonging to the said R. H. Newman." In other words, the deed shows a clear intention on the part of R. H. Newman to convey all his property. In addition to this, plaintiff at one time claimed that the deed was made to defraud his creditors. At another time he claimed that the deed was made in order to enable his wife to sell his property and join him in acquiring a new home out west. If either of these positions be true, it is quite remarkable that he intended to convey only that part of his real estate in which he had an interest in remainder after the death of his sister, rather than the part in which he held a complete fee, and which, on that account, was more liable to be subjected to his debts, or could have been more readily disposed of. Taking into consideration the language of the deed itself, the fact that the tract in con-

troversy is a part of the old James Newman farm, the circumstances under which the deed was made, the purpose that the grantor had in view, his subsequent declarations that he owned no property, but had conveyed it all to his wife, we conclude that there can be no doubt that he clearly intended to convey to his wife the land in controversy, and that it is embraced in and covered by the deed which he made to her.

This conclusion makes it unnecessary for us to determine whether plaintiff is estopped from maintaining this action by the judgment in the suit which he brought against his children to quiet his title to the land adjacent to the tract in controversy. Certainly the defendants in this action are not precluded by that judgment from asserting title to the tract in litigation. In that case plaintiff sought to quiet his title to an entirely different tract of land. The defendants, by answer and counterclaim, denied his title to that tract, and pleaded title in themselves. He having put in issue the title to a tract of land different from that now in controversy, they had the right to confine their defense and counterclaim to that particular tract, and were not required to litigate with him the title to any other tract, even though covered by the deed under which they claimed. That being true, their failure in that action to assert by way of counterclaim title to the land now in controversy does not preclude them from asserting title thereto in this action, where, for the first time, the title has been called in question.

Judgment affirmed.

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### Gusler, et al. v. Hays.

#### Same v. Same.

(Decided June 10, 1913.)

#### Appeals from Lawrence Circuit Court.

1. Finding of Chancellor.—Some weight will be given the finding of the chancellor on a question of fact, and his finding will not be disturbed on doubtful evidence.
2. Deeds—Deed Made by Mother Pursuant to Agreement With Husband.—A deed made by a mother to two of her children will not be disturbed at the instance of the other children on the ground

of undue influence, when it appears that it was made pursuant to a plan agreed upon between her and her husband years before, although it makes an unequal distribution of her estate, it not appearing how the husband's estate was distributed.

A. O. CARTER, CAIN & THOMPSON and G. W. CASTLE for appellants.

A. J. GARRED, W. D. O'NEAL, JR., for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Affirming.

Margaret Adams on September 6, 1907, executed two deeds to her sons John Hays and Sterling Hays by which she conveyed to them about seventy-five acres of land which was all the land she owned. The consideration as set out in each deed is the sum of \$200 and the obligation of the grantee to pay \$30 to each of three of his sisters or the children of such were dead. There were six sisters and each of the grantees was to pay three of them the sum of \$30. By each deed it was provided that it should come in full force at the death of Margaret Adams; that is, she retained the use of the land for her life. She died in the spring of the year 1912, and soon after her death these actions were brought by some of her other children and grandchildren to set aside the deeds on the ground that she was not mentally competent to make them, and that they were obtained by undue influence. The issues were made up and a large mass of testimony taken. Upon final hearing the circuit court dismissed the petitions. The plaintiffs appeal.

The appeal raises purely a question of fact. Margaret Adams was seventy years old when she made the deeds. Her first husband was William Hays and from him she received the land in controversy. They had eight children( two boys and six girls. After William Hays' death she married James Adams about twenty-four years before the deeds in question were made. The girls had all married and lived at more or less distance from their mother. The two sons each lived in a quarter of a mile of her and on a part of the original Hays tract which had previously been conveyed to them. According to the evidence for the plaintiffs, Ella Carter, a daughter of the grantor, died in July, 1907. She was very much attached to this daughter, and nursed her very assiduously. After her daughter's death, her mind for some time was unsettled. Previous to this, she had expressed the pur-

pose of dividing her property equally among all the children. In September, 1907, the two sons divided the land between themselves, went to a deputy clerk and had him prepare the deeds and he took them over and they were signed by Margaret Adams and her husband, James Adams. She afterwards declared that she had to sign the deeds; that they were worrying her life out of her. Nothing was paid when the deeds were executed, although the sons afterwards paid or offered to pay the \$30 to each of their sisters. The land was worth \$2,000 or \$3,000 and was practically all the property she had. Such is the plaintiff's proof.

On the other hand the proof for the defendants is in effect this: William Hays, from whom she had received the land, had wished to deed it to the two sons in his lifetime, but she had put him off saying that there was plenty of time for this. After her first husband's death she continued to cherish the purpose of carrying out his wishes in deeding the land to the two sons. It was worth about \$1,200 or according to James Adams only \$700. She directed the two sons to divide the land between themselves and directed them to have the deeds drawn. After the deeds had been delivered an oil company was taking leases in the neighborhood and one of the sons offered to surrender his deed to his mother so that she could lease the land to the oil company and get the rent, but she declined, saying that she had made the deed and wanted it to stand. James Adams, her husband, was conveying his land to his children and when he asked her to sign the deeds he was making to his children, she said that she would do so, if he would sign the deeds she wished to make for her land; and he agreed to do so. While she could not read or write, she was a woman of good natural sense; the evidence leaves no doubt in our minds that she fully understood what she had done, and that the deeds were executed to carry out the wishes of her first husband from whom she had received the land. The great weight of the evidence shows that she was entirely competent to execute the deeds when they were executed, and that she had long held the purpose of not dividing the estate equally between all the children.

On a question of fact we give some weight to the finding of the chancellor and we do not disturb his finding on doubtful evidence. Except for a short time just after her daughter's death when she talked and acted strangely, nobody seems to have conceived the idea that she was

not of sound mind, and the great majority of the witnesses who lived around her and knew her best testify not only that they never saw or heard anything indicating unsoundness of mind, but that they never heard the question suggested until after her death. She was a good housekeeper, managed her own business and seems to have understood her business transactions. In view of the fact that the deeds were evidently made to carry out the wishes of her first husband, and no doubt to execute a plan agreed upon between him and her, the circuit court did not err in refusing to set them aside. While there is great inequality in what the children get from her, we do not know what they got from their father, William Hays, and it may be that taking his estate and her estate together, the children were more nearly equalized.

Judgment affirmed on both appeals.

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**County Board of Education of Christian County, et al.  
v. Board Trustees Hopkinsville Public Schools.**

(Decided June 10, 1913.)

**Appeal from Christian Circuit Court.**

1. **School Board—Contract With—Indebtedness—Constitutional Provision.**—A contract by which a county board agreed to pay \$3,000 annually for five years, creates an indebtedness of \$15,000, but is not in violation of section 157 of the Constitution, unless this sum when added to the existing indebtedness, exceeds the income or revenue provided for the year.
2. **School Board—Contract With—Discretion—Review.**—A county board may contract with the city board for the free tuition of the county pupils in the city high school, and in making such contracts the boards are given a discretion which will not be reviewed by the courts when fairly exercised.
3. **School Board—High School Not Necessarily Under County Board—Contracts.**—It is not necessary under the statute that the high school shall be under the control of the county board. How it shall be governed is a matter to be settled by contract between the two boards under the statute, and a contract made while the boards had a school in operation will be considered as referring to the kind of school the parties then had.

**BREATHITT & BREATHITT** for appellants.

**W. T. FOWLER and HUNTER WOOD & SON** for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Affirming.

The act of March 24, 1908, among other things provides:

“Within two years after the passage and approval of this act, there shall be established by the county board of education of each county one or more county high schools: Provided, there is not already existing in the county a high school of the first class; if such high school already exists, and if the county board may be able to make such an arrangement with the trustees or board of education of said high school as will furnish to the pupils completing the rural school course free tuition in said high school, then said high school may be considered as meeting the purpose of this law without the establishment by the board of another high school. The county board of education in the various counties shall have full power and authority to unite with the governing authorities of any city or town in their respective counties for the purpose of establishing a high school for the joint use of the city or town and such county, and to unite with such authorities for the purpose of maintaining such high school if one be already in existence. For this purpose said county boards are hereby given full power and authority to make such contracts as they may deem necessary or proper for the establishment and maintenance of such high school for the joint use of the county and such city or town. Said contract shall be in writing and shall contain full and complete stipulations as to employment and compensation of teachers, courses of study, payment of the expenses of the school and the control and discipline of the pupils. The first county high school to be established in the county shall be located at the county seat, provided there is not already existing in the county seat a high school of the required grade. The county high schools of this Commonwealth shall be of the first, second and third classes. A first class high school shall maintain a four years course of study, which shall be prepared by the State Board of Education. Such course of study may provide for instruction in manual training, domestic science and elementary agriculture. High schools of the second class shall maintain a course of three years, identical with the first three years of the first class high school. High schools of the third class shall maintain a course of two years, identical

with the first two years of the first class high school." Ky. Stat., Sec. 4426a, Sub-sec. 8.

After the act took effect the city of Hopkinsville was maintaining a high school, and negotiations began between the board of trustees of the Hopkinsville public schools and the county board of education looking to the establishment of a high school to be controlled by the two boards jointly and the education of the county pupils in the city high school until the buildings required for the projected joint school could be erected. The negotiations culminated on April 4, 1910, in a written contract between the two boards by which it was provided that the county board should buy a lot of ground costing \$5,000 and adjoining the lot bought by the city for \$9,500; that the two boards by proper conveyance one to the other should become joint owners of the lots; that upon them thus owned the two boards would erect a high school building, the building to cost in round numbers \$70,000, the equipment \$10,000 and the foundation for the building \$4,000, and that the annual expenses incurred in the conduct of the school were to be borne by the county and city board according to the number of pupils attending the high school from the county and city. The county board bought the lot for \$5,000 and paid for it. An architect was employed who drew plans for the building, and his plans were accepted by the two boards. The foundation was built and paid for, each board paying one-half. After this had been done the county board finding itself unable to raise its half of the cost of the building and equipment amounting to \$40,000 by the time the money would be due, a new contract was entered into between the two boards by which the stipulations of the original contract as to the payment by the county board of \$40,000 for the erection and equipment of the building were eliminated, and the following in substance were substituted therefor: The county board should pay to the city board the sum of \$8,000 a year payable annually as tuition in addition to the cost of maintenance payable on January 1 of each year for a period of five years, and when these payments were made the city board should convey to the county board an undivided half interest in the building and equipment; the city should proceed to erect a building in accordance with the plans and specifications at a cost not exceeding \$70,000 in excess of the foundation, the equipment to be provided and purchased by a high school council selected by the two boards and

not to cost exceeding \$10,000. Under this agreement, the county board made its first payment of \$8,000, the city board was proceeding with the erection of the building and the county pupils were being taught in the city high school, when doubts arose as to the validity of the contract on the part of the county board because it created an indebtedness exceeding the income and revenue provided for the year and was unauthorized under section 157 of the Constitution. After much deliberation and consultation between the two boards, a new contract was made on February 14, 1911, by which the original contract as modified was annulled and abrogated; and it was provided that the city board should complete the school building and maintain a first class high school in the city of Hopkinsville; that county pupils eligible for admission should have the right to attend the high school free of tuition; that the county board should pay for their instruction the sum of \$3000 annually for a period of five years. The county board conveyed to the city board its undivided half interest in the lots on which the building was to be erected, and also gave up the \$2,000 which it had paid for the foundation. The city board returned to the county board \$6,000 of the \$8,000 which had been paid retaining \$2,000 for the tuition of the county pupils in the high school for that year. It was further agreed in the contract that should the county board decide to purchase or become a joint owner in the high school property at any time at an agreed valuation, it should have a credit on such agreed valuation for the sum of \$7,000 this being the amount relinquished by it in the dissolution settlement. When the first installment of \$3,000 became due under the new contract of February 14, 1911, the superintendent of schools for the county refused to pay the amount and the city instituted this suit to compel her by mandamus to pay it. In defense of the suit, she insisted that the contract of February 14, 1911, created an indebtedness exceeding the income and revenue provided for the year, and was void under section 157 of the Constitution; that the county board had been overreached by the city board in making the contract, and that the contract was not warranted by the statute or within the power of the county board. The circuit court on the hearing of the case held that \$15,000, the amount of the indebtedness created by the contract of February 14, 1911, was not in excess of the revenue provided for the year; that the contract was fairly and intelligently



made, and that it was one which the county board had authority under the statute to make. The defendant appeals.

1. As the contract provided for an annual payment of \$3,000 for five years, it must be regarded as creating an indebtedness of \$15,000. (O'Brien v. City of Owensboro, 113 Ky., 680.) We give some weight to the finding of the circuit court on questions of fact, and we do not disturb his finding of fact on doubtful evidence. The weight of the evidence shows that the total revenue provided for the year was about \$32,000, and that the \$15,000 of indebtedness when added to the previous indebtedness made a total indebtedness of something less than \$30,000. We conclude from a careful investigation of the record that the above are the facts and that the contract did not create an indebtedness which when added to the existing indebtedness exceeded the revenue provided for the year. (Lawrence Co. v. Lawrence Fiscal Court, 130 Ky., 590; Hopkins Co. v. St. Bernard Coal Co., 114 Ky., 153.)

2. The evidence wholly fails to show that the county board was overreached in the settlement. The proof shows that the settlement was made after days of discussion and upon the advice of counsel. The county board was required under the act to establish a county high school, and it decided to establish the high school at Hopkinsville. By the agreement in question it secured the high school. The city board had gone into the arrangement with the county board for the establishment of a joint high school at a joint expense. Larger school buildings and larger equipment were necessary for the joint school than for the city school. When the parties had in part performed their agreement they came upon the stumbling block that the agreement was beyond the power of the county board under section 157 of the Constitution. What was to be done? The county board was still under obligation to establish a high school, and an unexpected burden was about to be placed upon the city school. The arrangement which the parties made was both fair and reasonable. There were then in the city high school fifty county pupils and these at the usual charge of \$40 would cost the county \$2,000, so the city retained \$2,000 of the \$8,000 that had been paid it. The parties could not know for certain how many county pupils would be in the high school for the ensuing years, and so they finally agreed on a lumping estimate of \$3,000 a year, it being natural and to be expected that the

number of pupils from the county would gradually increase as the new system was put in operation, and there were more county pupils eligible for the high school. When the county pupils exceed seventy-five, the city will be the loser by the lumping contract, and when they fall under seventy-five the county will be the loser. But the contract was made by people who knew the local conditions, and it is as fair to one municipality as to the other. The only thing the county gave up in the settlement was its one-half interest in the lots for which it had paid \$5,000 and the \$2,000 it had paid on the foundation, and this \$7,000 it is to be credited by at any time when it decides to buy the property or a half interest in it at a fair valuation. The county could not reasonably expect the city to furnish it high school facilities including the larger building and larger equipment without some inducement, and we cannot say that the county board abused a sound discretion in making this arrangement especially in view of the fact that it has a right to purchase the property or half of it, whenever it gets able to do so. In other words it would appear from the record that the county board being powerless to establish a high school, as it had originally contemplated under the contract of April 4, 1910, made this temporary arrangement by which it secures a high school for the county pupils for five years, and obtains an opportunity in the meantime to get in a position to buy half the property and carry out that contract.

3. By the statute, if a high school already existed in the county, and if the county board is able to make such an arrangement with the trustees as will furnish to the pupils completing the rural school course free tuition in the high school, then such school may be considered as meeting the purposes of the act. The county board is given full power and authority to unite with the governing authorities of any city or town in their respective counties for the purpose of establishing a high school for the joint use of the city or town and the county, and to unite with such authorities for the purpose of maintaining a high school if one be already in existence. For this purpose the county boards are given full power and authority to make such contracts as they may deem necessary or proper for the establishment and maintenance of such high schools for the joint use of the county and such city or town. The statute was plainly designed to give the county and city boards a wide discretion upon

the ground that a joint high school with its larger means would furnish to all the pupils better facilities than a smaller school supported by smaller means. What is best to be done is a matter depending upon local conditions and many circumstances, and therefore the statute clothed the board with full power and authority to make such contracts as they deemed proper or necessary. We do not see that the board exceeded its authority or that it did not exercise a fair and reasonable judgment.

It is insisted however that the contract made here does not contain full and complete stipulations as to employment and compensation of teachers, courses of study, payment of the expenses of the school or the control and discipline of the pupils, and that it is silent as to whether the high school shall be of the first, second or third class. But these matters were substantially set out in the contract of April 4, 1910; the parties had in fact been running the high school under that contract from the beginning of the term and were so running it on February 14, 1911, when the new contract was made. Plainly the new contract refers to the high school that the parties were then running, and contemplates that the school shall be run substantially in the same manner for the five years. It is not necessary under the statute that the high school where a contract is made with the city authorities, shall be under the control of the county board or under the joint control of both boards. How the high school shall be governed is a matter to be settled by contract between the two boards under the statute, and in the case at bar it is agreed that the city board is to run the high school. When the county board is given full power and authority to make such contracts as they deem necessary, it cannot be said that they may not contract with the city authorities for the use of a city school which is under the control of the city authorities.

On the whole case we see no substantial error to the prejudice of appellants.

Judgment affirmed.

**City of Louisville, et al. v. Board of Education of City of Louisville, et al.**

(Decided June 10, 1913.)

**Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).**

1. School and School Districts—Are State Institutions—Taxes for Benefit of Are State Taxes.—Every common school in the State, whether it be located in a populous city or in a sparsely settled rural district, is a State institution, and taxes levied for the benefit of schools are state taxes and not municipal, county or district taxes, although they may be levied and collected by municipal, county or district agencies.
2. Schools and School Districts—Exemption From Municipal Taxation Does Not Exempt From School Tax.—An ordinance enacted pursuant to constitutional and statutory provisions, authorizing municipalities to exempt from municipal taxation for five years manufacturing establishments, did not exempt them from the payment of school taxes levied by the municipal authorities for the benefit of the common school situated therein.
3. Statutes—Contemporaneous Construction.—The mere failure of public officers charged with the public duty of enforcing statutory and constitutional provisions in respect to levy and collection of taxes, should not be permitted to stand in the way of the correct administration of the law or be construed to estop more diligent and efficient public officers when they attempt to perform their duty by bringing into the revenue proper subjects of taxation that have theretofore been allowed to escape the payment of taxes.

STUART CHEVALIER, PENDLETON BECKLEY for appellants  
City of Louisville, et al.

KOHN, BINGHAM and SLOSS & SPINDLE for appellant, Shuttleworth Clothing Co.

CLAYTON B. BLAKEY, ARTHUR M. RUTLEDGE for appellees.

**OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

Section 170 of the Constitution provides in part that "The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location." In pursuance of this constitutional provision, the General Assembly in 1898 enacted a law, now section 2980a of the Kentucky Statutes, applicable to cities of the first class, providing that "The general council shall have power

by ordinance to exempt from municipal taxation, for a period not exceeding five years, manufacturing establishments, as an inducement to their location within the city limits;" and by an ordinance approved in July, 1898, the general council of the city of Louisville, following the language of the Constitution and the statute, provided for the exemption for a period of five years of such manufacturing establishments as were entitled to the exemption.

In 1913 this suit was brought for the benefit of the Board of Education of the City of Louisville against the Assessor of the city and two manufacturing establishments located within the city, asking for a mandamus to compel the Assessor to assess for the use and benefit of the Board of Education the property owned by these establishments and subject to taxation within the city. The Assessor as well as the manufacturing concerns, resisted this suit upon the ground that under the Constitution, the statute and the ordinance, the establishments that it was sought to compel him to assess were exempt from taxation for school purposes.

In answer to this defense the Board of Education which is a public corporation having charge of the public schools asserted that the exemption authorized did not apply to taxes levied for school purposes, and this view of the question having been adopted by the circuit court, the writ of mandamus was awarded and the Assessor and the establishments sought to be assessed prosecute this appeal.

It will be observed that the exemption authorized is from "municipal taxation," and the controlling question in the case is, whether or not a school tax levied by the municipal authorities for the benefit of the public or common schools of the city is a municipal tax within the meaning of these constitutional and statutory provisions. If the school tax so imposed is to be treated as a municipal tax, it is of course conceded by counsel for the Board of Education that the property sought to be assessed for the purpose mentioned is not subject to assessment. On the other hand, if the school tax levied by the municipal authorities is to be regarded as a State tax, then the property sought to be assessed is subject to the tax.

This question is no longer an open one in this State. We have several times written in substance and effect that every common school in the State, whether it be located in a populous city or in a sparsely settled rural

district, is a State institution, protected, controlled and regulated by the State, and that the fact that the State has appointed agencies such as fiscal courts, school trustees and municipal bodies to aid it in the collection of taxes for the maintenance of these schools, does not deprive them of their State character. *City of Louisville v. Commonwealth*, 134 Ky., 488; *Prowse v. Board of Education*, 134 Ky., 365; *Elliott v. Garner*, 140 Ky., 157; *Board of Education v. Townsend*, 140 Ky., 248; *McIntire v. Powell*, 137 Ky., 477; *City of Henderson v. Lambert*, 8 Bush, 607; *Bamberger, Bloom & Co. v. City of Louisville*, 82 Ky., 337.

Therefore, when a municipal body, or a county, or a school district levies taxes for school purposes, the tax so levied is a State and not a municipal, county or district tax, although it be levied and collected by municipal or county or district officers. The fact that the tax is levied and collected for the State by these agencies of the State appointed for that purpose does not deprive it of its character as a State tax.

Being a State tax as distinguished from a municipal, county or district tax, the city, as well as the legislature of the State, would be without power, even had it attempted to do so, to exempt property from the burden of this tax, as section 170 of the Constitution forbids the exemption from taxation of any property not therein mentioned.

We are referred by counsel for appellants to the cases of *Louisville School Board v. City of Louisville*, 113 S. W., 883; *City of Louisville v. Louisville School Board*, 119 Ky., 574; *City Council of Richmond v. Powell*, 101 Ky., 7, and *Commonwealth of Kentucky, by, etc., Southern Pacific Co.*, 154 Ky., 41, but in no one of these cases was the question here presented involved, and in no one of them was it held in opposition to the list of authorities cited that a school tax was not a State tax.

A further argument in behalf of this exemption is rested on the ground of contemporaneous construction. It appears that from the time of the adoption by the city of the exemption ordinance heretofore quoted until 1912, neither the taxing authorities of the city of Louisville, nor the school officers of the city, made any effort to collect from manufacturing establishments, exempt from taxation under the ordinance, a school tax, and it may be conceded that it was understood and consented to by these officials that the exemption ordinance relieved

the establishments to which it applied from the payment of a school tax, and this failure of these officials to collect or attempt to collect the tax is seized upon as a reason why the school tax should not now be collected.

The doctrine of contemporaneous construction is frequently invoked and sometimes applied as an aid in the construction of statutes of doubtful meaning. Illustrative cases on this subject are, *City of Louisville v. Louisville School Board*, 119 Ky., 574; *Harrison v. Commonwealth*, 83 Ky., 162; *Auditor of Public Accounts v. Cain*, 22 Ky. L. R., 1889; *City of Louisville v. Louisville Water Co.*, 105 Ky., 754; *Trustees v. Board of Education*, 141 Ky., 126; *City of Louisville v. Ross*, 135 Ky., 315; *Commonwealth v. Kentucky Distilleries & Warehouse Co.*, 143 Ky., 314. But we do not know of any authority that would authorize the court to resort to the doctrine of contemporaneous construction for the purpose of defeating the effect of plain and unambiguous constitutional and statutory provision that impose taxes. The mere failure of public officers charged with a public duty to enforce statutory and constitutional provisions in respect to the levy and collection of taxes, or the acquiescence of public officers in conditions that exempted certain property from its fair share of the burdens of taxation, should not be premitted to stand in the way of the correct administration of the law or be construed to estop more diligent and efficient public officers when they attempt to perform their duty by bringing in to the revenue proper subjects of taxation that had theretofore been allowed to escape the payment of taxes.

Another argument advanced by counsel for appellants in support of the exemption claimed is found in a statute which it is said only authorizes the Board of Education to demand that the city shall levy taxes for the benefit of the schools on property subject to municipal taxation. It appears that when the charter of the city of Louisville was adopted in 1893, there was a section in the act relating to education, providing in substance that there should be levied and collected a tax of not less than 33 cents on each one hundred dollar's worth of property assessed for taxes for city purposes, and this declaration as to the character of property that should be subject to school taxation was subsequently followed in amendments to the school law.

It should, however, be kept in mind that in 1893, when the statute was first enacted, providing for the levy of

school taxes on property assessed for city purposes that manufacturing establishments were not exempt from taxation for city purpose. The act authorizing this exemption was not adopted until 1898, and it is manifest that the legislature, in providing that school taxes should only be levied on property subject to taxation for city purposes, did so, not with any view of declaring that any property should be exempt from taxation for school purposes, but merely because these words were used in the original act. But however this may be, the legislature had no authority to exempt any property subject to State taxation from taxation for school purposes.

It is further suggested, although the suggestion is not pertinent to the matter in hand, that a ruling that a school tax is a State tax and not a municipal tax, would have the effect of virtually destroying the exemption afforded by the Constitution and statute, as well as the ordinance, to manufacturing establishments, as a number of objects for which municipal corporations levy and collect taxes have been declared to be not for municipal purposes, and hence all the taxes collected for these objects must be regarded as State and not municipal taxes. As it would be out of place in this opinion to enter into a discussion of what are and what are not, strictly speaking, municipal taxes, or taxes levied for municipal purposes, we must decline to express any opinion on the subject referred to. We put our decision in this case distinctly upon the ground that a school tax is not, and has never been recognized in this State as other than a State tax.

Having the foregoing views of the law of this case, the judgment of the lower court is affirmed.

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### **City of Paris v. The Burley Tobacco Society, et al.**

(Decided June 10, 1913.)

#### **Appeal from Bourbon Circuit Court.**

1. **Taxation—Tangible Personal Property—When Subject to City Taxes.**—Under section 4025 of the Kentucky Statutes, tangible Personal property is subject to city taxes when it has established a taxable situs based on the actual situation of the property in the city, and whether tangible personal property has established a taxable situs or not depends on the facts of each case.



2. **Taxation—Claimant or Bailee in Possession Liable for.**—Under section 4023 of the Kentucky Statutes, the claimant or bailee in possession of property is liable for the taxes thereon.
3. **Taxation—Sufficiency of Petition to Enforce Collection of.**—Where tangible personal property was assessed for city taxation, and afterwards a suit was brought to enforce collection of the taxes so assessed, the petition on its face, which charged in effect that the title and possession of the property sought to be assessed was in the city in the hands of an agent or bailee, stated a cause of action sufficient to require a defense showing how the tobacco was held by the agent and how long it had been and would be within the city.

C. M. McMILLAN for appellant.

TALBOTT & WHITLEY and CLAUD M. THOMAS for appellees.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

This suit was brought for the purpose of collecting taxes alleged to be due by the Burley Tobacco Society, the Bourbon County Board of Control and D. W. Peed, agent of these corporations, to the city of Paris, for the years 1907, 1909 and 1910, upon a large quantity of tobacco stored in warehouses in the city of Paris during the year for which the tax was sought to be collected. A general demurrer was sustained to the petition as amended, and, declining to plead further, the petition was dismissed, and this appeal prosecuted by the city.

It was charged in substance in the petition that the Burley Tobacco Society is a corporation, as is also the Bourbon County Board of Control, which is merely a subsidiary corporation of the Burley Tobacco Society, and that these corporations jointly and severally had power to handle, grade, ship and sell tobacco, and do all other things necessary to carry out the purposes of their organization and that D. W. Peed was the managing agent of each of these corporations. It is averred that in the year 1907 a large number of tobacco growers, whose names are unknown to the plaintiff, executed and delivered to these corporations a writing obligating the signers as follows:

“We, the undersigned, for and in consideration of the benefits to be derived from having our tobacco handled and sold by the Burley Tobacco Society, a branch of the American Society of Equity, Department of Tobacco Growers, do hereby pledge to the said society the number of acres of tobacco set opposite our

names, raised during the season of 1906, and do constitute it our agent for the purpose of receiving, grading, handling and selling the same on such terms as the society may prescribe in accordance with its constitution and by-laws."

It is further averred that in 1909 and 1910 there was executed to these corporations by a number of tobacco growers, whose names are unknown to the plaintiff, a writing in which the signers agreed to and did "constitute and appoint the Bourbon County Board of Control and the Burley Tobacco Society, corporations under the laws of Kentucky, as sole agents for the purpose of receiving, commingling, handling, warehousing, inspecting, insuring, grading, financing and selling all of said tobacco in such manner and on such terms as said Burley Tobacco Society may prescribe pursuant to its charter and by-laws, and for such purpose hereby transfer and assign to and invest in said agents the title and right of possession to said tobacco," and further averred that pursuant to said agreements a large quantity of tobacco was pledged and delivered to these corporations and the title to the same was transferred and assigned to them, and the said tobacco was held by defendants in the city of Paris, the principal place of business and the principal office of the defendant, the Bourbon County Board of Control, during the years 1907, 1909 and 1910.

The petition contained other necessary allegations, but it is not important to refer to them here, as the parts we have copied are sufficient to illustrate the questions at issue in the case. The substance of the petition as amended is that during the years mentioned a number of tobacco growers, pursuant to the agreements set out, delivered the title and possession of the tobacco owned by them to these Burley Societies for the purpose of being put on the market and sold by them pursuant to the provisions of their charters, and that during the years mentioned, these societies had in their possession in the city of Paris, for the purposes mentioned, the tobacco which was assessed for taxation and that is sought in this suit to be subjected to the tax levied on the assessment.

It is insisted by counsel for appellees (1) that the agreements under which the tobacco was surrendered to these societies did not pass title to them but only created them trustees to hold it in trust for the tobacco growers, and that property held in trust is taxable at the residence of the beneficial owners; (2) that the petition was

fatally defective in failing to allege that the tobacco growers who executed these agreements and delivered their tobacco in pursuance therewith were residents of the city of Paris and consequently all property owned by them subject to taxation in the city; and (3) that the petition was further fatally defective in failing to aver that the tobacco sought to be taxed was permanently situated or located in the city of Paris.

If the tobacco growers who executed these agreements and delivered possession of the tobacco to these corporations paid themselves the tax thereon for the years mentioned, of course in no state of case should the corporations be required to either assess or pay taxes on it, as to require them to do so would be double taxation. But if the tobacco delivered to these corporations was not assessed by the growers, and was subject to taxation in the city of Paris, it should be assessed in the possession of the corporations, as their agent or trustee. It is not material which, as section 4023 of the Kentucky Statutes, provides that "the holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property on the first day of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment."

Section 4025, of the Kentucky Statutes, also provides in part that "tangible personal property shall be listed and taxes paid thereon in the county, municipality and taxing district where the same has established a taxable situs based on the actual situation of the property." Under this statute, if the taxes on this tobacco had not been paid by the growers, and if it had a taxable situs based on the actual situation of the property in the city of Paris, it is subject to taxation there for the years in which it had a taxable situs in the city. We may further add that if this tobacco was only in the possession of the corporations in the city of Paris temporarily or for a temporary purpose, it was not subject to taxation in the city. *Hill v. Caldwell*, 134 Ky., 99.

Having these general views of the law applicable, we think the petition as amended stated a cause of action sufficient to require a defense. Having nothing before us except the petition, we do not venture any opinion as

to what disposition should be made of the case when the pleadings are made up and the evidence in, as the decision of the case on its merits will depend on the facts shown by the evidence.

Wherefore, the judgment of the lower court is reversed, with directions to overrule the demurrer to the petition as amended and for further proceedings not inconsistent with this opinion.

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### Alexander v. Alexander, et al.

(Decided June 10, 1913.)

#### Appeal from Owen Circuit Court.

**Sheriffs—Action Against Deputy—In Pari Delicto—Relief.**—Where a sheriff assigns certain territory to his deputies and retains the balance of the county for himself, and collects and appropriates to his own use penalties and omitted taxes due the state and county, and knowingly suffers and permits his deputies to pursue the same plan in the districts assigned to them, and the state and county subsequently recover a judgment against him for the sum so collected, equity will afford him no relief in an action by him to recover of his deputies the sums unlawfully appropriated by them, where the evidence shows that there was a well arranged plan by which they were all to profit at the expense of the state and county, even though the sheriff received no part of the sums unlawfully appropriated by his deputies.

CLORE, DICKERSON & CLAYTON, H. W. ALEXANDER, H. G. BOTTS and W. A. LEE for appellant.

W. B. MOODY and J. G. VALLANDINGHAM for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Plaintiff, P. A. Alexander, was elected sheriff of Owen County for a term of four years beginning the first Monday in January, 1898. Prior to his election he approached defendant, L. P. Alexander, and requested him to make the race with him, and entered into a written contract with him by which he agreed to appoint defendant his deputy during his term as sheriff. After describing the territory in which defendant was to act as deputy, the contract provides:

"Said boundary is allotted to said deputy and all the sheriff's business therein, subject however to the rules, usages, practices and regulations heretofore common between high sheriffs and deputies.

"The within agreement is made on condition, that said deputy will conduct his business within the limits prescribed by the high sheriff, and will faithfully perform his duties as deputy sheriff and render his books and accounts for inspection by said high sheriff when called upon to do so.

"Said deputy is to have all profits arising from deputy's business that falls to him in said boundary."

On the first Monday in January, 1908, plaintiff qualified as sheriff by taking the oath of office and executing the various bonds required by law. Thereafter he annually renewed his various bonds as provided by statute. After assuming the duties of his office he appointed defendant a deputy and took from him a bond, signed by two sureties, by which they agreed, upon his failure to do or perform any of his duties as deputy sheriff, they would pay over to plaintiff any and all sums of money that the defendant failed to pay over, and all damages done to plaintiff by any acts of the defendant. Thereafter defendant made a settlement with plaintiff for each year of his incumbency as deputy.

Several years later the fiscal court of Owen County began an investigation of its fiscal affairs and the conduct of all of its ex-officials covering a period of thirteen years, including the term of plaintiff as sheriff. This investigation brought to light the fact that many thousands of dollars, which belonged to the State and county, had been collected by plaintiff and his deputies and retained by them. Of the amounts so collected some were for excess commissions, some were for penalties, and some were for taxes (called "sleepers") on omitted polls and property. Thereupon it brought a suit against plaintiff and his bondsmen to recover certain sums claimed to be due. After trial in the court below and a reversal of the judgment on appeal to this court, a judgment was entered against plaintiff for certain sums and interest aggregating \$17,000. Plaintiff effected a compromise with the county of Owen by paying it \$12,500. He also paid the Commonwealth of Kentucky the sum of \$1,200 in compromise of certain suits brought against him by the Auditor of Public Accounts.

On February 9, 1911, plaintiff brought this action against defendant to recover certain excess commissions, penalties and "sleepers" for each of the years 1899, 1900, 1901 and 1902, which sums it is alleged defendant, in violation of law, collected and appropriated to his own use. Numerous defenses were made by defendant. Proof was taken and on final hearing plaintiff's petition was dismissed as to all items except the sum of \$356, excess commissions collected by the defendant for the years 1900 and 1901. Judgment was given against the defendant for this sum and he appeals. Plaintiff prosecutes a cross appeal from that part of the judgment dismissing the petition as to the other items involved.

Defendant's principal defense is based on the fact that the sums collected and retained by him were fruits of the unlawful, fraudulent and unconscionable transaction in which plaintiff himself participated in such a way that equity will not afford him any relief.

The record discloses the fact that the sheriff had made for himself and deputies pretended copies of the assessor's books. He caused to be put on these books large amounts of property and many polls which were omitted from the assessor's books. He settled with the State and county by the assessor's books, and with his deputies by the pretended copies thereof, and thereby received and converted to his own use the difference. It is further shown that throughout the term of plaintiff, and, indeed, during the preceding term when he was a deputy sheriff, there existed a system of collecting taxes from the citizens and taxpayers who were not assessed, or whose names did not appear on the assessor's books, for the particular year, but whose property was actually subject to assessment and taxation for those years. The sheriff and his deputies collected such taxes as if the property had been assessed, but failed to report them as omitted or to account to the county for the sums so collected. The evidence leaves no doubt that the sheriff did this himself in the territory retained by him, and knew and acquiesced in the same line of conduct on the part of his deputies. Plaintiff, however, insists that the doctrine of *in pari delicto* should not be applied in this case because he received no part of the penalties and "sleepers" collected and retained by his deputies. In other words, it is argued that there was no joint interest or participation by plaintiff in the wrongs of defendant. On the contrary it is claimed that the wrong of plaintiff

and the wrong of defendant were entirely distinct, and that equity denies relief only in the event that one's hands are soiled in the transaction which is the subject of the action. In determining this question, however, the duties and relations of the parties must be taken into consideration. The statute not only prohibits the sheriff from collecting taxes before they are duly assessed and certified by him, but makes it his duty to report to the county court any assessment or omitted list of persons coming within his knowledge. Kentucky Statutes, sections 4067, 4241; *Alexander v. Owen Co.*, 136 Ky., 420. When the sheriff knew, therefore, that the persons and property constituting the list of "sleepers" were not assessed, it became his duty by virtue of the statute to cause them to be reported for assessment. He not only failed in his duty in this respect, but actually collected the omitted taxes himself and converted them to his own use. Not only so, but he knowingly suffered and permitted his deputies, including the defendant, to pursue the same course. The plan adopted, the practice pursued and all the attending circumstances show that there was a well arranged plan or scheme by which plaintiff and his deputies were to profit at the expense of the county and State. In such a case the sheriff can be a guilty participant without receiving any of the proceeds of the sums unlawfully collected by his deputies. Having devised the illegal scheme himself, and having set an example for his deputies by his own unlawful conduct, and having knowingly permitted his deputies to follow that example and to pursue the same corrupt practices in their respective districts, his participation in the unconscionable transaction was such as to soil his hands, even though he received from his deputies none of its fruits. A sheriff will not be permitted to say to his deputies, "Violate the law, collect all you can, keep all you get—I will do the same thing myself," and then recover the sums so collected and retained by his deputies, which he never intended to collect, had it not been for the action of the State and county in compelling him to account for such sums. The whole scheme being fraudulent and corrupt, and the taint being on him as well as his deputies, equity will afford him no relief.

No reasonable distinction can be made between "sleepers" and penalties, which were collected and retained by defendant. They belonged to the county and were part of the fruits of the unlawful arrangement.

It appears that prior to the adoption of the present Constitution there was in force a special act applicable to Owen county, fixing the commission of the sheriff at 7 per cent. It was held in *Alexander v. Owen County*, *supra*, that this special act was repealed by the general law regulating fees of sheriffs generally, which was subsequently enacted. We think it reasonably clear from the record that both plaintiff and defendant were laboring under the mistake that the special act was still in force, and that the allowance of commissions to the defendant at the rate of 7 per cent was due to this mistake. That being true, we are inclined to agree with the chancellor that the allowance of the excess commissions constituted no part of the unlawful scheme by which the sheriff's office was conducted, but was the result of an honest mistake on the part of the parties. It follows that a recovery of the excess commissions was properly allowed.

Judgment affirmed both on original and cross appeal.

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### **Caldwell & Drake v. Pierce.**

(Decided June 10, 1913.)

#### **Appeal from Jefferson Circuit Court (Chancery Branch, First Division).**

1. **Finding of Chancellor—Evidence.**—In an action by a sub-contractor against a contractor to recover balance due on several contracts, evidence examined and held to sustain the finding of the chancellor as to certain items.
2. **Contracts—Building—Plans and Specifications—Decision of Architect and Construction Board—Effect.**—Where the specifications for a public building provide that "if any discrepancy appears in the plans and specifications, the same must be referred to the architect for correction. All differences or discrepancies as to sizes and quality of materials and workmanship, the decision of the architect and the Court House Construction Board is to be final and binding on the contractor," the decision of the architect and the Court House Construction Board that certain marble and tile work furnished by a sub-contractor who agreed to do the work in accordance with the plans and specifications, were included within the specifications, and should not be allowed as extras, is binding on both the contractor and the sub-contractor in the absence of a showing of fraud or mistake.

EUGENE R. ATTKISSON for appellants.

GIFFORD & STEINFELD for appellee.



OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming on cross appeal and reversing  
on original appeal.

At the time of the institution of this action plaintiff, Fannie J. Pierce, trading and doing business as the Marbleithic Company, was engaged in manufacturing and installing marble and tile works. Defendants, George W. Caldwell and Leslie Drake, partners trading and doing business under the firm name of Caldwell & Drake, were general contractors engaged chiefly in the business of erecting public buildings. For many years prior to the institution of this action, defendants, when they took contracts for the erection of public buildings, would employ plaintiff as sub-contractor to do the marble and tile work. Among the sub-contractors which plaintiff had were those covering marble and tile work on buildings at Gallipolis, Ohio, Morgantown, West Virginia, Port Clinton, Ohio, New Martinsville, Greencastle, West Baden and Hammon, Indiana, and Parkersburg, West Virginia.

Plaintiff brought this action against defendants to recover certain balances alleged to be due on the Gallipolis, West Baden, Morgantown, New Martinsville and Greencastle contracts. The defendants admitted certain items in plaintiff's account, and denied others, and pleaded counterclaims growing out of the contracts at Hammon, Port Clinton and Parkersburg, and asked judgment over against plaintiff. By reply, plaintiff denied all balances alleged to be due defendants, and pleaded the five-year statute of limitations to the counterclaim growing out of the Port Clinton and Parkersburg contracts. During the progress of the action plaintiff was permitted to file an amended petition wherein she alleged that she had been under the belief that the Port Clinton and Parkersburg contracts were not in writing, and she, therefore, interposed the plea of limitation, but upon ascertaining that they were in writing she denied the defendants' counterclaim growing out of these transactions, and pleaded that there was a balance due her. The case was referred to the master commissioner to hear proof and report his findings. To his report on the Gallipolis, New Martinsville, Morgantown and Port Clinton contracts no exceptions were filed. As to the Greencastle, West Baden, Hammond and Parkersburg accounts, both plaintiffs and defendants filed exceptions. On final hearing, all the exceptions were over-

ruled, and the chancellor rendered judgment in favor of plaintiff in the sum of \$1,391.43, with six percent interest thereon from March 16, 1912. From that judgment defendants appeal and plaintiff prosecutes a cross appeal.

The only items in dispute under the contract at West Baden are two checks for \$60 each, payable to the order of the Marbleithic Company, one of which is endorsed "Marbleithic Company, by C. W. Cousins," and the other "Marbleithic Company, by Charles Brothers." Mr. Caldwell testified that these checks were given for labor and material furnished the Marbleithic Company in order to keep mechanic's liens from being filed. He thought that Cousins was an employee of the Marbleithic Company, but did not know who the Charles Brothers were who endorsed the other check. Mr. Pierce testified that neither Cousins nor the Charles Brothers were employees of the Marbleithic Company; that he knew of no such persons, and that no such persons had authority to receive money for the company or to endorse its checks. In view of this evidence, we see no reason to disturb the finding of the chancellor.

On the contract at Hammond, Indiana, defendants claim an overpayment of \$66.34. It appears that this item was in dispute, and that defendants afterwards sent their check to plaintiff for \$2,921.47 without deducting the \$66.34. Pierce says that there was a settlement of the matter; Caldwell denies the settlement. The fact that the check for \$2,921.47 was sent to plaintiff after the dispute arose tends to confirm Pierce's testimony, and we conclude that the commissioner and the chancellor properly rejected this item of defendants' counterclaim.

Under the Parkersburg contract it appears that plaintiff was to furnish the marble and tile work at so much per square foot. This work was completed several years before this suit was brought. Upon the completion of the work it was measured by defendants and a representative of plaintiff, and the amount fixed at \$6,671.70. The evidence for defendants is that they paid plaintiff this amount. Defendants now contend that the work done by plaintiff was defective, and that they and plaintiff's representative agreed on the sum of \$4,500 as being the amount due under the contract. They, therefore claim a balance in their favor equal to the difference between \$4,500 and \$6,671.70. The commissioner,

basing his conclusion on the statement of Mr. Drake to the effect that the amount of work done was \$7,000, found that plaintiff had been paid the sum of \$6,671.70, and that the balance due plaintiff was \$328.30. After it developed that the contract for the work at Parkersburg was in writing, plaintiff, in company with another man, went to Parkersburg. They measured the work done, and fixed the amount due on the contract at \$8,784.30. Plaintiff now claims the difference between the amount paid her and the above amount. Here, then, we have a case where plaintiff, several years after the work has been accepted and paid for, claims a balance due, while defendants claim an overpayment of about \$2,000. It does not appear that prior to this action there was ever any dispute between plaintiff and defendant with reference to the amount and value of the work done at Parkersburg. The work was measured by defendants and the representative of plaintiff. It was measured and paid for on that basis. We think it much safer to rely on the amount and value of the work as fixed by the parties at that time, than as now fixed by them when each is seeking to go over the old contracts and to assert a claim and counterclaim against the other. We, therefore, conclude that the chancellor erred in holding that there was a balance due on the Parkersburg contract of \$328.30.

We agree with the finding of the chancellor and commissioner on all the items in dispute at Greencastle, with the exception of the item for tile on the north porch and the item of \$550 for marble wainscoting in the vestibule. It appears that plaintiff contracted to do the marble and tile work according to the plans and specifications. Mr. Pierce testifies that the tiling on the north porch and the marble wainscoting in the vestibule were not covered by the plans and specifications, but were extras and should be charged as extras. The evidence for the defendants is to the effect that the architect and Court House Construction Board decided that these items were covered by the plans and specifications and by the original contract, and declined to allow them as extras. The specifications provide: "If any discrepancy appears in the plans and specifications the same must be referred to the architect for correction. All differences and disagreements as to sizes and quality of materials and workmanship, the decision of the architect and the Court House Construction Board is to be final

and binding on the contractor." The evidence in this case leaves no doubt that there was a disagreement between defendants and the architect and the Court House Construction Board in regard to the items in question. There is no evidence to the contrary. Their decision was against the contractor. As the defendants obligated themselves to do the work in accordance with the plans and specifications, and as plaintiff obligated herself to do the marble and tile work upon the same terms, we conclude that the decision of the architect and the Court House Construction Board to the effect that the items in question were required by the specifications and the original contract, and should not be allowed as extras, is, in the absence of a showing of fraud or mistake, binding on defendants and plaintiff alike. Waite on Engineering and Architectural Jurisprudence, section 402; *Kelly v. Public Schools of Muskegon, Mich.*, 68 N. W., 282; *Cuthat v. Gaw*, 15 Mich., 527; *U. S. v. Ellis, (Ariz.)*, 14 Pac., 300; *Porter v. Buckfield*, 32 Me., 559; *Texas, &c., Ry. Co. v. Rust*, 19 Fed., 239; *Duell v. McGraw (Sup.)*, 33 N. Y. Supp., 538; *O'Connor & McCullough v. Henderson Bridge Co.*, 95 Ky., 633. We, therefore, conclude that the chancellor erred in giving judgment in favor of plaintiff for the items referred to.

Judgment on cross appeal affirmed. On the original appeal the judgment is reversed with directions to enter judgment in conformity with this opinion.

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### **Illinois Central Railroad Company v. Commonwealth.**

(Decided June 12, 1913.)

#### **Appeal from Lyon Circuit Court.**

1. **Railroads—Act Requiring Trains to Stop at Stations Where a Penitentiary is Located—When Such Act Invalid.**—An act of the Legislature requiring all trains to stop at a station where there is a penitentiary of the State, is invalid as to interstate trains, when reasonable facilities are furnished at such station by other trains.
2. **Railroads—Act Regulating Service of.**—An act requiring railroad companies to continue such service as they were then rendering at other points in the same county, regardless of the necessity for such service is invalid.

JOHN C. GATES, TRABUE, DOOLIN & COX, BLEWETT LEE  
and C. L. SIVLEY for appellant.

JAMES GARNETT, Attorney General, OVERTON S. HOGAN, Assistant Attorney General for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Reversing.

An act approved March 19, 1912, provides as follows:  
“That hereafter any corporation, company or individual operating a railroad in the State of Kentucky, shall cause to stop all trains carrying passengers over such road at every point or station on said road where there is located, or may be hereafter located, any State Penitentiary. And all such corporations, companies or individuals shall immediately after this law goes into effect, publish its schedule, setting out for the benefit of the public all changes required by the operation of this act. No such corporation, company or individual shall, in carrying out the provisions of this law curtail the service it may be now rendering any other point or station within any county within which may be located such public institution of the Commonwealth, but it shall continue to render the same service in such counties as it may be now rendering.

“Any corporation, company or individual violating any of the provisions of this act, shall upon conviction, be fined not less than two hundred dollars nor more than five hundred dollars for each offense.” (Acts, 1912, p. 458.)

On July 7, 1912, T. C. Stone at Eddyville purchased a round trip ticket from Eddyville to Paducah and return. He went to Paducah and on his return to Eddyville boarded train No. 104, which is a fast interstate passenger train not scheduled to stop at Eddyville; he was required to leave at Kuttawa, a station west of Eddyville; he waited at Kuttawa ten or fifteen minutes for a local passenger train which followed train No. 104 and was taken on it from Kuttawa to Eddyville arriving there about fifteen minutes later than he would have arrived if he had been permitted to travel to his destination on train No. 104. The grand jury at its following term indicted the railroad company for failing and refusing to stop the train at Eddyville. The defendant demurred to the indictment, its demurrer was overruled. The case was then heard before a jury who found the defendant guilty and fixed its fine at \$200. The railroad company appeals from the judgment entered on the verdict.

Eddyville is the county seat of the county and a branch penitentiary is located there; but for a number of years the through night trains have stopped at Kuttawa, not at Eddyville. These trains are known as No. 103 west bound, and No. 104 east bound. They arrive at Eddyville at 3:17 a. m. and 2:17 a. m. respectively. The company maintains no night office at Eddyville. The following trains stop at Eddyville:

“No 122 east bound, stopping at Eddyville at 9:03 a. m.

“No. 102 east bound, stopping at Eddyville, 12:18 p. m.

“No. 136 east bound, stopping at Eddyville, 4:43 p. m.

“No. 135 west bound, stopping at Eddyville, 7:41 a. m.

“No. 121 west bound, stopping at Eddyville, 3:05 p. m.

“No. 101 west bound, stopping at Eddyville, 5:17 p. m.”

It will be observed by the act the railroad company is required to stop all its passenger trains at every point or station on the road where any State penitentiary is located, without regard to the number of other trains stopping daily at such point and notwithstanding the fact that the trains which stop at such point are sufficient for the reasonable accomodation of the traveling public. It will also be observed that by the act the company is not permitted to curtail the service it was at the time rendering any other point or station within the same county, and was required to continue to render the same service in such counties as it was then rendering without regard to the necessity for such service or the needs of the traveling public. Is such an act valid when applied to a train engaged in interstate commerce? In *Cleveland, etc. R. R. Co. v. Illinois*, 177 U. S., 514, the United States Supreme Court had before it a statute of the State of Illinois which required every train to stop at all county seats and the company had refused to stop at a county seat a fast train running between St. Louis and New York. The court said:

“The question broadly presented in this case is this: Whether a State statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station

within a few minutes before or after the arrival of the train in question."

The court then proceeded to show that the railroad company furnished a sufficient number of regular passenger trains to accomodate the business along the road, and held the act invalid. In *Miss. R. R. Co. v. Illinois Central R. R. Co.*, 203 U. S., 335, the court reviewed its previous opinions on the subject and adhered to the same conclusion. In that case, it said:

"In reviewing statutes of this nature, and also orders made by a state railroad commission, it frequently becomes necessary to examine the facts upon which they rest and to determine from such examination whether there has been an unconstitutional exercise of power and an illegal interference by the State or its commission with the interstate commerce of the railroad. Whether there has or has not been such an interference is a question of law arising from the facts."

In *Atlantic Coast Line v. Wharton*, 207 U. S., 328, where the facts were not unlike these here, the court said:

"Without stopping to consider whether, in view of the character of the trains to which the order before us related, it would not result that the order complained of was a direct regulation of interstate commerce, and testing the subject by the local facilities at the station at which the trains were ordered to stop, we think the railroad company in this case has furnished such reasonable accomodations to the people at Latta as it can be fairly and properly called upon to give, and the order to stop these trains is, therefore, not a valid one."

In *Herndon v. Chicago, etc. R. R. Co.*, 218 U. S., 135, the court reviewing its previous decisions thus summed them up:

"The principle to be deduced from these cases is, that where a railroad company has already provided ample facilities for the adequate accomodation of the traveling public such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers through the same places, at which such interstate trains do not stop, a state regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce."

As Eddyville is a place of only about one thousand people and six trains stop there every day, three east bound and three west bound, it cannot be said that the railroad company is failing to furnish reasonable facilities for the traveling public without also stopping two fast night trains at that point. Any one wishing to take these trains can take them at Kuttawa which is only about a mile away, and under the rulings of the Supreme Court it must be held as a matter of law that the act requiring the two fast night trains to stop there is invalid.

In addition to this the provision of the act requiring the railroad company to continue to render the same service in county as it was rendering at other stations before the act took effect, is clearly invalid. The purpose of this provision is not difficult to see. The act was designed to require all trains to stop at Eddyville, and it was desired to continue the stop at Kuttawa; for no other reason can be assigned for limiting the scope of the act to stations in the same county. The legislature may require railroads to furnish reasonable facilities but it cannot require it for all time to continue stopping all its trains at a station although the necessity for such a stop has long since passed away. When the invalid part of a statute may be separated from the valid part so much as is valid may be sustained; but when the part that is invalid is of the substance of the act, and it may be presumed that the legislature would not have passed the act at all but for the invalid part, the whole act is invalid. Here the continuance of the stops then being made is of the essence of the act; for without this the railroad company could simply have changed its stop from one station to the other. But the purpose of the act was to require it to stop at both stations.

We therefore conclude that the act is invalid and that the circuit court under the evidence should have instructed the jury peremptorily to find for the defendant.

Judgment reversed and cause remanded for further proceedings consistent herewith.



**Higdon v. Wayne County Security Company.**

(Decided June 12, 1913.)

**Appeal from Edmonson Circuit Court.**

1. **Land—Action for Trespass—Pleading.**—When the petition avers that the plaintiff is the owner of the tract of land in controversy and the defendant by his answer denies this, and alleges that he is the owner of the land, the affirmative matter in the answer is only an affirmative traverse of the allegations of the petition, and no reply is necessary.
2. **Pleading—Denial That Plaintiff is Corporation—Matter in Abatement.**—A denial that the plaintiff is a corporation presents a matter in abatement which should be disposed of in the circuit court, and if that court is not called to pass upon the matter it will not be considered on appeal.
3. **Land—Issue as to Title—When Transfer to Equity Improperly Made.**—The issue as to the title to the land being an ordinary issue on which the other issues in the action depended, the circuit court improperly transferred the action to the equity docket, thus denying to the defendant a trial by jury.

G. W. STONE, CHAS. V. HIGDON for appellant.

M. M. LOGAN, ORA HAZELIP for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Reversing.**

The Wayne County Security Company brought this suit against John Higdon and others. It alleged in its petition that it was a corporation duly organized under the laws of the State of New York and was the owner and in possession of a tract of land in Edmonson County known as the Walker Daniel 1,000 acre survey, described in the petition by metes and bounds; and that it and those under whom it claimed, had been in the actual, adverse and continuous possession of the land for a period of more than fifty years; that the defendants within the last few days before the filing of the petition, well knowing that they had no right to the land, had entered upon it with force and arms, and were unlawfully cutting much valuable timber from the land, and were threatening to cut and would continue to cut the timber unless enjoined by the court that each of the defendants were insolvent; that great and irreparable injury was about to be done it, and that it was without adequate remedy at law. A preliminary injunction was prayed and on final hearing judgment for \$500 damages and a

permanent injunction restraining the defendants from trespassing on the land or cutting the timber off of it. John Higdon filed an answer traversing all the allegations of the petition, and alleging affirmatively that he was the owner and in possession of a tract of land described by metes and bounds in his answer, and that he and those under whom he held had been in the actual, adverse, peaceable and continuous possession of this tract of land claiming it to a well defined marked boundary under a claim of right, residing thereon, and having the greater part thereof in actual cultivation for a period of more than fifteen years, and that he had cut no timber on any land not embraced in his own boundary. No reply was filed to the answer. The plaintiff then entered a motion that the court transfer the case to the equity docket to which motion Higdon objected. The court sustained the motion, and transferred the case to the equity docket. Higdon excepted. Thereafter an agreed order was made that the master commissioner sell the timber then cut and lying on the ground. The timber was sold by the commissioner for \$116.40 and the commissioner's report of sale was confirmed. On final hearing the circuit court entered judgment in favor of the plaintiffs as prayed in their petition. Higdon appeals.

It is insisted for appellant that judgment should have been entered in favor of Higdon on the pleadings as no reply was filed to his answer. But the allegations of the answer that Higdon owned a certain part of the boundary which the plaintiff alleged it owned, was simply an affirmative traverse of the allegations of the petition, and no reply was necessary. (*Scaggs v. Poteet*, 22 R., 775; *Wheeler v. Davis*, 29 R., 731). In *Hall v. Mineral Development Co.*, 31 R., 904, relied on by appellant, there were other allegations in the answer which were admitted by the failure to file a reply.

It is also insisted that as no proof was offered to show that the plaintiff was a corporation, the judgment in its favor upon the merits was erroneous. The denial that the plaintiff is a corporation only put in issue the plaintiff's capacity to sue. This objection, if apparent on the face of the petition, must be taken by demurrer; and if not apparent on the face of the petition, may be made by answer. In either case, if the objection is well taken there would be a defect of proper parties plaintiff. The objection raises a matter in abatement and not in bar of the action; and when it appears that

the objection is well taken, it furnishes a ground for an order of court requiring the additional parties to be made on pain of dismissal without prejudice, but it is not ground for a judgment in bar. The denial that the plaintiff was a corporation being merely a dilatory plea should have been disposed of by the court before the case was tried on the merits, and as the defendant did not ask that it be disposed of by the lower court, he cannot take advantage of it in this court. (*Carpenter v. Miles*, 17 B. Mon., 475; *Vanbuskirk v. Levy*, 3 Met., 119).

While neither of the above objections is maintainable, the objection that the court erred in transferring the case to the equity docket over the defendant's objection and exception, is more formidable. When he had objected to the motion and excepted to the ruling of the court, he did all that he could do, and he lost none of his rights by the subsequent proceedings in the case for he had the right, having saved his exception to the ruling of the court, to take his proof and try to win the case in equity to protect himself.

Counsel is in error in concluding that only an equitable issue was involved in the action. The plaintiff alleged title to the land. The defendant denied the plaintiff's title and pleaded title in him to the boundary from which the cutting in question was done. The real question in the case was, had the plaintiff the title to the land? All other matters were incidental to this and this was an ordinary issue. Section 11 of the Code is as follows:

"In an ordinary action properly commenced as such—

"1. If there be several issues, all of which were, before the first day of August, 1851, cognizable in chancery, though none was exclusively so, either party may, by motion, have the case transferred to the equity docket.

"2. Either party may, by motion, have the case transferred to the equity docket for the trial of any issue which, before the said day, was exclusively cognizable in chancery.

"3. If there be an issue which was not cognizable in chancery, and an issue which was exclusively cognizable in chancery, before the said day, the plaintiff may have the former issue tried before the latter be disposed of.

"4. If there be an issue which was not cognizable in chancery and an issue which was cognizable in chancery, but not exclusively so, before the said day, the case shall not be transferred to the equity docket without consent of the parties."

The issue as to the title to the land was not cognizable in equity before August, 1851, and the court was without authority to deprive the defendant of his constitutional right of trial by jury on this ordinary issue. (Smith v. Moberly, 15 B. Mon., 70; Geoghegan v. Ditto, 2 Met., 433; Carter v. Weisenburg, 95 Ky., 135; O'Conner v. Henderson Bridge Co., 95 Ky., 633; Moraneck v. Martineck, 128 Ky., 155).

As the defendant is entitled to a jury trial upon the issue raised by his answer, we refrain from any discussion of the merits of the case. On the return of the case to the circuit court, the plaintiff will be allowed to file such evidence as it may desire showing that it is duly incorporated, and the case will be set down for a jury trial. If the ordinary issue is found in favor of the plaintiff, the court will make such orders as may be proper in the matter of the injunction.

Judgment reversed and cause remanded for further proceedings consistent herewith.

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### **Bracket v. Modern Brotherhood of America.**

(Decided June 12, 1913.)

#### **Appeal from Lincoln Circuit Court.**

1. **Intoxicating Liquors—One Employed in Bottling House Not Engaged in Manufacture of Whiskey.**—A person who is employed at a bottling house bottling whiskey in bond under the supervision of the United States government which was made four years before is not engaged in the manufacture of whiskey as a beverage.
2. **Insurance, Life—Evidence as to Health of Member of Benefit Society.**—The evidence being conflicting as to whether the member was in good health when he was reinstated, the question is for the jury.
3. **Estoppel—Plea of.**—Matter constituting an estoppel cannot be shown under a traverse.

J. N. SAUNDERS for appellant.

J. B. PAXTON and SPARROW, PAGE & REA for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Reversing.

Ora Bracket brought this suit against the Modern Brotherhood of America to recover \$1,000, the amount of a certificate held by her husband in the Order. The Order by its answer pleaded in substance that the by-laws of the Order provide as follows:

"The certificate of any beneficial member of this Society, who is now engaged in the manufacture or sale of malt, spirituous or vinous liquors as a beverage, in the capacity of proprietor, stockholder, agent or employee, is hereby declared to be, and is hereby made absolutely null and void, and no payment made by such person of any dues, or assessments of any character, or for any purpose, to the secretary, or other officer of the subordinate lodge of which he or she is a member, or to the Supreme Secretary, or any officer the Supreme Lodge, shall have the effect of waiving such forfeiture or reinstating such certificate holder to any rights, benefits or privileges as a member of this society.

"Should any person who is now or who shall hereafter become a member of this Society, engage in the manufacture, or sale, of malt, spirituous or vinous liquors as a beverage in the capacity of proprietor, stockholder, agent or employee, or be convicted of a felony after being adopted into this Society, he shall thereby, by reason of said facts, forfeit all rights as a member of this Society, and his certificate shall thereby become absolutely null and void, without any action on the part of his subordinate lodge, the Supreme Lodge, or by this Society, or any of the officers thereof; and the payment by such member of any dues or assessments thereafter, or the acceptance thereof by the officers of his subordinate lodge or of the Supreme Lodge or of this Society, shall not have the effect of waiving such forfeiture or reinstating such person to any rights, benefits or privileges as a member of this Society."

It is also alleged that the plaintiff's husband, Isaac Bracket, was not a farmer at the time of his application as stated by him therein, but was then engaged in the manufacture of spirituous liquors as a beverage in the capacity of agent or employee, and that he continued in this occupation from that time until his death. The certificate was issued on September 21, 1909. Bracket died on July 23, 1911. The allegations of the answer as to Bracket's occupation were denied by the reply. On the

trial of the case, J. W. West testified that Bracket commenced working in a bottling factory in the fall of 1905, and worked there constantly from that time until his death, except when they would lay off for a month or two. Bracket was the man that attended to emptying the whiskey out of the barrels into the tank, helped about bottling it. These duties he said were necessary for the sale of the whiskey. Henry Traylor owned the distillery and leased it to Paxton Brothers, who did business under the name of the Edgewood Distilling Company. He did not know whether Bracket was working for the bottling company on September 20, 1909, he might have laid off, if he was not there he was laid off. He did not know whether the bottling house was running on that date. Ora Bracket testified that on September 21, 1909, her husband was a farmer working for Mr. Dorst; that he worked for Dorst for about two weeks, and when he ceased to work for Dorst he worked on the court house, and when he got through there went back to the bottling house; when he joined the Society he was stacking hay for Dorst. He had been working at the bottling house before he went to work for Dorst; he worked there for about six years; he worked at the court house about two months then went back to the bottling house. E. H. Moeller testified that he was foreman at the bottling house, came there July 6, 1910; that Bracket worked for him from that time continuously up to his death; that he did all the work pertaining to the bottling of whiskey, and his work was mostly putting on labels, etc; this was necessary he said to put the liquor on the market. The work was done in a United States government warehouse operated under the supervision of the government and was a place where the sale of liquor was not tolerated or indulged in by the employees; everything in connection with the whiskey was under the supervision of the Federal government. Bracket did not handle the whiskey until four years after it was made, when it was put in bottles. On this evidence the circuit court instructed the jury peremptorily to find for the defendant; and the plaintiff's petition having been dismissed she appeals.

It will be observed that by the by-laws, the certificate of a member was void if he was "engaged in the manufacture or sale of malt, spirituous or vinous liquors as a beverage in the capacity of proprietor, stockholder, agent or employee." It is clear from the proof that the deceased was not engaged in the sale of malt, spirituous or vinous

liquors as a beverage. The only question to be determined is was he engaged in the manufacture of spirituous liquors as a beverage. He was employed at the bottling house; the work was done in a United States government warehouse operated under the supervision of the government. The whiskey was not bottled until four years after it was made, and it was then bottled under the supervision of the government. Bracket's duties were to attend to emptying the whiskey out of the barrels into the tanks, he helped about bottling it, and his work was mostly putting on labels, etc.

It is a sound rule that the language of insurance contracts being selected by the insurer, shall be construed against him, and that a recovery on the contract will not be denied the insured unless required by the terms of the contract naturally construed. The United States government taxes the manufacture of whiskey at so much per gallon. When the whiskey is made and put into barrels, it is placed in a government warehouse, and may remain there for a number of years. The tax on it is paid when it is taken out of the warehouse, or when the period for which it may remain in the bonded warehouse has expired. In the case at bar the whiskey had been manufactured and placed in the warehouse and four years afterwards, the owners, instead of selling it in barrels had the whiskey placed in bottles before selling it. Much whiskey is sold in barrels. The business of bottling whiskey in bond had much increased of late years from the fact that much rectified whiskey is on the market; and that whiskey that is bottled in bond and stamped by the government cannot be rectified whiskey. The bottling of whiskey however is not confined to the distiller who manufactures it; it may be bottled by others, and the fact that it is bottled by the distiller does not change the nature of the business. We do not think that the employees in this bottling house who were putting the whiskey in bottles four years after it was made, can fairly be said to have been engaged in the manufacture of spirituous liquors as a beverage; for the whiskey was a completed product when placed in the barrels and much of it is in fact sold in that way. Certainly the man who washed the bottles before the whiskey was put in them or who ran the machine by which the bottles were corked, would not be said to be engaged in the manufacture of spirituous liquors as a beverage, and we do not see that Bracket can be distinguished from either of these. He was simply helping to

put in bottles the whiskey which had been made four years before, and had been for four years lying in a warehouse. The fact the work was done at a distillery, and not somewhere else, does not change the character of the employment. When the insured has taken out insurance and paid his assessments in good faith, he should not be denied a recovery on his policy, unless the language of the policy, fairly construed, was sufficient to put him on notice of the restriction; and in a matter of doubt the doubt should be resolved in favor of the insured. We, therefore, conclude that the deceased was not, under the evidence, engaged in the manufacture of spirituous liquors as a beverage, and that the court should not have instructed the jury peremptorily to find for the defendant on this ground.

The defendant by its answer pleaded in substance that it was stipulated in the contract that the insured should pay his assessments in each calendar month, and that if he failed to pay his certificate became void; that any member suspended for the non-payment of his assessments, might be reinstated by the payment within sixty days of his dues, provided he was in good health at the time of his reinstatement; that the deceased failed to pay his assessments in the month of June, and that he paid them on July 2, and was reinstated, but that at that time he was not in good health, but was suffering from the disease which afterwards resulted in his death. The plaintiff by her reply denied that the insured was not in good health when he paid the assessment and was reinstated or that he was then suffering with the disease from which he died. The proof on the trial by his wife was that he was taken sick on July 5. The proof for the company by a physician was that the deceased consulted him on July 2, but the physician's evidence is not clear as to the cause of this consultation. Under the evidence the question should have been submitted to the jury.

It is insisted for the appellant that the defendant waived its right of forfeiture for non-payment of assessments because its custom was to receive the stipulated payments though made after the time required by the contract, and that it is, therefore, estopped from enforcing the forfeiture, although the deceased was not in good health when he made the payment. But an estoppel must be pleaded; matter in estoppel cannot be given in evidence under a traverse. On the return of the case the



plaintiff will be allowed to amend her reply if she desires to do so.

Judgment reversed and cause remanded for further proceedings consistent herewith.

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## **Tarpy, et al. v. Lexington & Eastern Railroad Co.**

(Decided June 12, 1913.)

### **Appeal from Clark Circuit Court.**

1. **Executors and Administrators—Sale of Land by—When Purchaser of Cannot Insist Upon Purchase.**—An executor who is authorized to sell enough land to pay the debts of the estate is without authority to sell more land than is reasonably necessary for this purpose, and a purchaser from him with notice of his want of authority, cannot insist upon his purchase.
2. **Wills—Direction to Sell Land—Sale by Executor—When Should Be Set Aside.**—Where the will directs so much of a tract sold as is necessary to pay the debts, and from the shape and size of the tract it may be presumed to be divisible without materially impairing its value, a sale by the executor of the whole tract for \$700, when the debts amounted to only \$200, should be set aside, the purchaser having notice of the facts.

J. SMITH HAYS, JR., J. SMITH HAYS, SR., for appellants.

B. R. JOUETT, SAMUEL M. WILSON and H. H. MOORE for appellee.

### **OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.**

The will of W. A. Hickerson which was duly probated contains these provisions:

“2. I give and bequeath to my wife, Belle B. Hickerson, all my property of every kind to have and to hold same during her natural life or whilst she is my widow, with remainder to my children equally.

“3. I nominate and appoint W. P. Hackett the executor of this will and authorize and empower him, if he shall deem it necessary to sell and convey so much of my real estate, situated on Magnolia street, in Winchester, Kentucky, as may be required to pay my debts. Said Hackett having generally agreed to act without compensation, I request the court not to require surety of him.”

After his death the widow and children remained in possession of the real estate. While they were thus in

possession the executor sold and conveyed to J. W. Pointer for \$700 the lot above referred to. Pointer conveyed it to W. A. McDowell and W. A. McDowell conveyed it to the Lexington & Eastern Railway Company, Pointer and McDowell being the agents of the railroad company in the transaction and acting for it. The lot fronts 100 feet on Holly avenue and 300 feet on Magnolia avenue. It is 315 feet deep on one side and 375 feet deep on the other. The debts of the estate amounted to only \$200, and Pointer was informed of this when the purchase was made. The widow and children brought this suit to quiet their title to the property and have the deed canceled, alleging the above facts, charging that it was void; that the property was susceptible of partition, and that the act of the executor was unauthorized and void. The circuit court sustained a demurrer to their petition and dismissed the action. They appeal.

By the will the executor was authorized if he deemed it necessary, to sell and convey so much of the lot as was required to pay the testator's debts. While the executor was authorized to make a sale if he deemed it necessary of so much of the land as was required to pay the debts, like any other trustee he was required in discharging his trust to exercise a reasonable judgment and he was not authorized to sell more of the land than was reasonably necessary for the payment of the debts. It is true that under section 4846, Kentucky Statutes, the purchaser from him was not bound to look to the application of the purchase money, and his title would not be affected by the misapplication of the purchase money by the executor. But that is not the question here. The general rule is that a trustee's act beyond the scope of the authority conferred upon him, is invalid, and if the person dealing with the trustee has notice that the trustee is exceeding his authority, he has no higher rights than the trustee was authorized to confer. We see no reason why this rule should not be applied to a sale made by an executor without authority where his want of authority was known to the purchaser at the time he purchased. In *Larue's Heirs v. Larue, Executor*, 3 J. J. Mar., 156, it was held that a purchaser in good faith was not affected by the fact that the executors transcended their authority in selling more land than was necessary, but in that case the purchasers had no notice that the executors were exceeding their authority. In *Rutherford v. Clark*, 4 Bush, 27, the court said:

“When a will directs the sale of real estate, if necessary, for the payment of all the testator’s debts or legacies, a purchaser at any such sale, not being presumed to know, or to be able by reasonable diligence, to know the condition of the estate or the extent of its indebtedness, or of its assets, should be protected in his purchase whenever made in good faith, without notice, actual or constructive, of the latent fact that there was no necessity for the sale, and consequent want of authority to make it. If this were not so, prudent men would not bid a fair price at such sales. Policy and justice, therefore, have established the rule, as recognized by abundant authority in both Virginia and Kentucky.”

But in that case the court found as a fact that the purchasers had notice that the executor was exceeding his authority, and the sale was set aside. It is true in that case the property was sold for less than its value, but this fact is only referred to by the court as a circumstance. In the case at bar although the debts amounted to only \$200, the land was sold by the executor for \$700 and the purchaser knew the amount of the debts when he bought.

It is insisted that it is not alleged in the petition that the property was susceptible of division without materially impairing its value, and that it must be presumed that the executor exercised a reasonable judgment in selling the whole tract, although the debts amounted to only \$200. But it will be observed that by the will the executor was authorized to sell and convey so much of this lot as might be required to pay the debts. The will on its face shows that the testator regarded the property as divisible, and that he contemplated a sale of so much of it as might be necessary. In addition to this as the lot fronts 100 feet on one street, 300 feet on another, and runs back from 315 to 375 feet, we think it may be presumed that such property in a city is divisible without sacrifice. The presumption of course may be rebutted by proof and if in selling the whole lot, the executor exercised a reasonable judgment to protect the estate from loss, the sale must not be set aside. But as the demurrer to the petition admits the facts therein stated to be true, we are of opinion that on these admitted facts, nothing else appearing, the sale of the whole lot by the executor was unauthorized, and should be set aside. (18 Cyc., 321).

Judgment reversed and cause remanded to the circuit court with directions to overrule the demurrer to the petition.

**Cincinnati, New Orleans & Texas Pacific Railway Co.  
v. Martin.**

(Decided June 12, 1913.)

**Appeal from Boyle Circuit Court.**

1. **Appeal—Law of the Case.**—A holding by the court of Appeals that a verdict was flagrantly against the evidence, and that notwithstanding this fact there was sufficient evidence to take the case to the jury, is the law of the case, so long as the evidence is the same; and where such condition existed on the second trial it was the duty of the trial court, upon motion seasonably made, to set aside the verdict.
2. **Trial—Improper Argument.**—Comments by counsel in argument to the jury not supported by the record should be excluded from consideration by the jury, and in addition the jury should be told that the argument is improper. If the argument is prejudicial, a verdict obtained by counsel so offending should be set aside.

CHARLES H. RODES, JOHN GALVIN, NELSON D. RODES,  
and GEORGE E. STONE for appellant.

JOHN W. RAWLINGS, ROBERT HARDING and EMMET PUR-  
YEAR for appellee.

**OPINION OF THE COURT BY JUDGE LASSING—Reversing.**

This is the second appeal of this case. The former opinion will be found in 146 Ky., 260. In that opinion a detailed account of the facts upon which plaintiff based his cause of action and the defendant its defense is given, and it is unnecessary to restate them here.

The case was reversed upon two grounds: First, error in the admission of evidence; and second, because the verdict was flagrantly against the evidence. Upon the return of the case, a second trial was had, with the result that plaintiff recovered a verdict for a sum slightly less than that recovered on the first trial. The defendant appeals and assigns as grounds for reversal the following: First, error of the court in failing to give a peremptory instruction; second, error in refusing to set aside the verdict, because flagrantly against the evidence; third, misconduct of counsel for plaintiff in the argument of the case, to which objection was made and exceptions saved at the time; and fourth, because the verdict is excessive.

The evidence for appellee upon the last trial was, in no material respect, different from that offered upon the first trial. Indeed, it was the same. The evidence for the

appellant railroad company varied slightly, but the new points brought out in no wise strengthened appellee's case, on the contrary, it tended, if anything, to weaken it. Hence, we have a state of facts which, upon the former appeal, we said was not sufficient to support a verdict, and on this account the judgment was reversed. The fact that the case is again before us with a judgment in favor of appellee on the verdict of another jury adds nothing to the value of the evidence offered by appellee to prove his case. The verdict, upon the first trial, was flagrantly against the evidence; it is still so. Section 341 of the Civil Code provides: "Nor shall more than two new trials be granted to a party upon the ground that the verdict is not sustained by the evidence." This is a prohibition on the right of the court to disturb a third verdict even though it may be flagrantly against the evidence, but there is no statute or rule of practice denying to this court, or to the trial court, the right to set aside a second verdict on the ground that it is flagrantly against the evidence. This principle was expressly recognized in *L. & N. R. Co. v. Daniel*, 131 Ky., 689. The trial court, upon motion seasonably made, should have set aside the verdict because flagrantly against the evidence.

There is no merit in the contention that a peremptory instruction should have been given. Upon the former appeal, it was held that, while the verdict was flagrantly against the evidence, there was sufficient evidence to take the case to the jury. That ruling is the law of the case so long as the evidence is the same; and it is conceded that this condition existed.

As the case must be retried, we find no necessity for passing upon the point that the verdict is excessive.

The argument of counsel objected to is the following statement: "Gentlemen of the jury, I will tell you how that freight train was pulled out of that tunnel. It was split in two and pulled out in two sections; the engine pulled the first half out and then came back and pulled the other half out; that is the only way that they could have done it." We fail to find any evidence in the record upon which such statement could be based, and counsel for appellee practically concede this and that it was merely a theory of his own. This line of argument was improper and prejudicial, and the court should have done more than merely state to the jury that they were to try the case according to the testimony. He should have expressly stated that it was not a proper line of argument

and that the jury must not consider it. A lawyer should be careful in the presentation of his case to confine himself to the facts brought out in the evidence and to reasonable deductions to be drawn therefrom. Beyond this limit he cannot go with safety, and where judgment is procured a lawyer, who has pursued an improper line of argument, should not be permitted to enjoy the fruits of victory thus obtained.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

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**Board of Drainage Commissioners of Ballard County  
v. Henderson.**

(Decided June 12, 1913.)

**Appeal from Ballard Circuit Court.**

1. **Appeal—Statutes—Moot Question—Review.**—The Court of Appeals will not construe a statute in a moot case, nor until its construction is rendered necessary in order to determine the rights or interests of parties arising thereunder.
2. **Drainage—Appeal—Partial Transcript—Presumptions.**—The record of a proceeding in the county court, referred to and made a part of the record in an action to enjoin the collection of a drainage tax, not having been copied into transcript, upon appeal it will be presumed that such missing evidence supports the finding and judgment of the chancellor.

W. T. WHITE, H. F. TURNER for appellant.

WM. HENDERSON for appellee.

**OPINION OF THE COURT BY JUDGE LASSING—Affirming.**

This is an appeal from a judgment of the Ballard Circuit Court, in which we are asked to pass upon the constitutionality of Chapter 143 of the Acts of 1912, approved March 19, 1912, relating to the drainage of lands, the establishment and construction of public levees ditches and drains. Appellee sought in the lower court to enjoin appellant from assessing, levying and collecting a tax upon his land, upon the theory that the proceeding under which it was acting was void.

From an agreed statement of facts copied into the record, it appears that the proceeding in this case, from its inception down to the time of the rendition of the

judgment, was had, not under the act the validity of which is here assailed but under the statute which the act in question expressly repealed. When the judgment was entered, the parties affected thereby agreed that, although the law under which they had been proceeding was repealed, further proceedings in the case should be under said law. The proceeding having been in part under the old law and in part by agreement, it is apparent that a determination of the correctness of the chancellor's ruling would, in no wise, involve a consideration of or necessitate a construction of the act in question. This court will not construe a legislative act in a moot case, nor until its construction is rendered necessary in order to determine the rights or interests of parties arising under the provisions of such act.

The record shows that the case is here on only a partial transcript. Reference in this record is made to a suit in the county court of Ballard County, which is referred to and made a part of the record in this case, but it has not been copied into this record. In the absence of the record referred to, we must presume that the missing portions of the record contain a statement of facts which justifies and supports the finding and judgment of the chancellor.

For the reasons indicated, the judgment is affirmed.

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### **Chesapeake & Ohio Railway Company v. Stapleton, et al.**

(Decided June 12, 1913.)

#### **Appeal from Floyd Circuit Court.**

1. **Trial—Improper Argument—Objection to—How Taken.—**When improper argument of counsel for the successful party is relied on as a ground for reversal, the objectionable argument should be set out in the bill of exceptions, which should also show that objection was made to it at the time.
2. **Trial—Continuance—Discretion of Court.—**In civil actions the matter of granting a continuance is largely in the discretion of the trial court, and when the affidavit for a continuance is permitted to be read as the deposition of the absent witness, it is only in very exceptional cases that the refusal to grant a continuance will be error.

HARKINS & HARKINS, WORTHINGTON, COCHRAN & BROWNING and F. T. D. WALLACE for appellant.

MAY & MAY for appellees.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The appellee, Stapleton, while engaged as a laborer for the appellant railway company, received personal injuries, and in this suit to recover damages he had a judgment for \$650. A reversal is asked for alleged error in the admission and rejection of evidence and in giving and refusing instructions, because the verdict is excessive, and for misconduct of counsel for appellee in the argument of the case, and failure of the trial court to grant a continuance.

The facts are substantially these. The railway company was engaged in ballasting its road, and it used in doing this work a train consisting of an engine and cars known as gondola hopper cars. It seems that in the bottom of the beds of these cars were doors that opened toward the track, letting the contents of the cars fall out on the track; and the cars were moved by an engine so as to distribute the ballast as needed. On the occasion in question, appellee, in company with several other laborers, was in one of these cars helping to move the crushed rock towards the opening in the bottom, so that it might fall through on the track, and it appears that while he was standing on a rod that run through the bottom of the bed of the car over the opening, the car was suddenly moved by the engine and he was thrown through the opening to the track and dragged by the car and stone some distance before the train was stopped.

There is some conflict in the evidence as to the distance the car was moved after appellee fell through the opening and before it was stopped. The witnesses in his behalf say the car ran about thirty feet, while witnesses for appellant say that it only ran about seven feet. But however this may be, it is not disputed that appellee fell through the opening and was dragged some distance.

We may also say at this point that the judgment is not excessive, as the evidence shows that appellee was seriously injured.

It also appears that it was the custom of the employees of the company in charge of the train to give warning



or notice to the laborers working in the cars, as appellee was, when the cars were going to be moved, so that they might take whatever precautions were necessary to prevent being injured by the movement, and several witnesses for the company testified that before the car was moved on the occasion in question the usual warning was given, while an equal number of witnesses in behalf of appellee say that the car was moved without warning or notice. This question, which is really the controlling one in the case, is the subject of much contradictory evidence, but the witnesses who testified on this point for appellee had opportunity to know whether the notice was given or not, and their evidence was sufficient to warrant the jury in finding that no notice was given. We may further observe that the admitted fact that it was usual and customary to give notice shows that it was regarded as important that the train should not be moved until the laborers in the car were notified of the movement.

It is also apparent that the injuries received by appellee were caused entirely by the movement of the train, because if he had fallen through the opening when the car was standing, it is not at all probable that he would have been hurt.

Taking up now the errors relied on for reversal, complaint is made that on the examination of one of the laborers counsel for appellee, over the objection of counsel for appellant, was permitted to ask him if he had not heard the foreman tell the man when he was in a hurry that it did not make any difference if some of them did get killed as there was another man waiting for the job and the witness answered yes. This question was invited by questions asked the witness by counsel for appellant in an effort to show that the foreman was very careful to avoid injury to the men, and made every possible effort to keep them from getting hurt. This entire line of interrogation by the attorneys for both parties was improper and incompetent, and except for the fact that the question complained of was to rebut questions tending to show that the foreman was an exceedingly careful man, it would be sufficient to justify a reversal of the case. But considering the circumstances under which the question was asked, we do not think the error sufficient to warrant us in ordering a new trial.

It is also argued by counsel for appellant that the attorney for appellee, in his closing argument, was guilty of misconduct in making statements outside the record

for the purpose of prejudicing the jury. The improper argument is pointed out in the motion and grounds for a new trial, but we do not find in the bill of exceptions any reference to it, or that any objection was made to it at the time, and therefore the misconduct of counsel is not available error on this appeal. If counsel desire to rely for reversal on the fact that opposing counsel was guilty of misconduct in the argument of the case, the improper argument should be shown in a bill of exceptions, together with the objections and exceptions to it that were made at the time.

Another assigned error is the failure of the trial court to grant a continuance. A motion for a continuance was made on account of absent witnesses, but the court permitted the affidavit to be read as the deposition of the absent witnesses, and as several witnesses who were present testified to substantially what it was set out the absent witnesses would say, we do not think the court erred in refusing a continuance. In civil actions the matter of granting a continuance is largely in the discretion of the trial court, and when the trial court permits the affidavit to be read as the deposition of the absent witness, it is only in very exceptional cases that the refusal to grant a continuance will be error. Section 315 of the civil code, which provides the method of obtaining a continuance, declares in part that if the affidavit of what the absent witness would say if present is permitted to be read, the trial shall not be postponed on account of his absence.

The instructions are also criticised, but we think they submitted fairly to the jury the substantial issues in the case. In the instructions the jury were told in substance that if the persons in charge of the train carelessly and negligently moved the car in such a violent manner as to throw appellee through the opening, they should find for him in damages, but that if appellee knew or had any information that the cars were going to be moved, and after receiving such warning, failed to exercise ordinary care for his own safety, they should find for the company. They were further told that he assumed all the risks incident to the employment that were not the result of carelessness on the part of persons in charge of the train.

Upon the whole case we think the appellant company had a substantially fair trial, and the judgment is affirmed.

**Ward, et al. v. Ward.**

(Decided June 12, 1913.)

**Appeal from Henderson Circuit Court.**

1. Vendor and Purchaser—Lien For Purchase Money—Priority Over Mortgage Lien.—A lien retained in deed conveying land to secure unpaid balance of purchase money is superior to a mortgage lien of the same date.
2. Sureties—Indemnity—Mortgages—Pledges—Disposition of Proceeds.—Where a debtor executes to his surety a mortgage and also assigns policies of life insurance to him to indemnify him against loss by reason of his suretyship and to secure the payment of indebtedness then existing between him and his surety, the proceeds of the policies of insurance should be applied, first to the payment of the mortgage debt, and second, to the discharge of any indebtedness of the principal to the surety existing at the time of the assignment of the policies.

YEAMAN &amp; YEAMAN for appellants.

MONTGOMERY MERRITT for appellee|

**OPINION OF THE COURT BY JUDGE LASSING—Reversing.**

In May, 1902, Thomas E. Ward and his wife, S. Isabel Ward, purchased a house and lot in the town of Henderson for something like \$2,000 and had the title conveyed to them jointly. They paid a part of the purchase money in cash and executed their purchase money notes for the remainder, amounting to \$1,200. For this balance of the purchase money they signed two promissory notes, of which the Ohio Valley Banking & Trust Company became the purchaser. Upon the day upon which said property was purchased and conveyed to them, Thomas E. Ward borrowed from said bank \$1,000 for which he gave two notes for \$500 each. These notes were secured by the endorsement of his brother, E. C. Ward, and others. To secure the endorsers on these two notes for \$500 each against loss on account of their suretyship, Thomas E. Ward and his wife S. Isabel Ward, executed to them, or to one of them for the benefit of all, a mortgage upon the same property. Thomas E. Ward and his wife moved into said property and used and occupied it as a home until his death in June, 1911. He had procured two policies of insurance on his life, one for \$3,000 and another for \$1,000. The \$3,000 policy had been permitted to lapse and he had received from the

company a paid-up policy for \$120. The \$1,000 policy was kept alive and in force from the time it was taken out until his death. About three months after the \$1,000 policy was taken out, he assigned and transferred it absolutely to his brother, E. C. Ward, and at sometime before or after that date he also transferred to him absolutely the policy for \$120.

Following the death of Thomas E. Ward, his widow called upon E. C. Ward, her brother-in-law, and notified him that he must apply the proceeds of these insurance policies to the payment of the two \$500 notes of her husband, which were held by the bank and upon which he was surety. It appears that, at the time of the death of Thomas E. Ward, he was indebted to E. C. Ward in various sums, (some of which were evidenced by promissory notes) amounting in the aggregate to more than \$1,400. Notwithstanding the request or demand made on him by the widow as to the application of the insurance money, E. C. Ward insisted upon his right to apply it to the discharge of his other indebtedness, leaving the two \$500 notes unsatisfied. The widow brought suit against him to compel him to make the application as requested. He answered alleging the application in accordance with his expressed intentions to her and sought to have the mortgage foreclosed and the property sold to pay the two \$500 notes upon which he was surety. The bank was made a party. Proof was taken and upon final submission, the chancellor was of opinion and held that the defendant E. C. Ward had the right to make the application as he did and directed the property sold to pay, first, the two \$500 notes, and second, the bank's note for the purchase money. Both the widow and the bank appeal.

It is not stated in the judgment the ground upon which the court was influenced in holding that the lien to secure the mortgage notes was superior to that of the bank for the purchase money debt. This must have been due to inadvertence in the preparation of the judgment. The purchase money lien was superior to all other liens, and the bank should have been given a superior lien upon the entire property for the payment of its debt with accrued interest.

From the evidence it is plain that, at the time the assignment of these policies of insurance was made, Thomas E. Ward was not indebted to his brother in any sum in excess of \$90, save on account of his suretyship

on the two \$500 notes. It is not contended that the assignment was made other than for the purpose of securing E. C. Ward against loss on account of his suretyship for his brother. There is no evidence from which it could be even inferred that Thomas E. Ward, at that time, contemplated that he would become indebted to his brother, E. C. Ward, but, on the contrary, there is evidence tending to show that he took this insurance for the purpose of paying off his \$1,000 debt to the bank upon which his brother was surety, so that, in the event of misfortune to him, a home might be left to his wife and children. In the absence of some express agreement showing that the assignment of these policies was made to enable Thomas E. Ward to secure, through his brother's endorsement, additional sums of money, we conclude that the assignment was made to secure his then existing indebtedness, and the trial court erred in not holding that the insurance money should be applied to the discharge of these mortgage notes.

But, it is insisted that, before the suit was brought, appellee had applied the insurance money to the discharge and satisfaction of his other indebtedness. He is in no position to shelter himself behind such defense. He knew, before he made such application, that his brother's family were claiming that he had no right to make such application, and his rush to do so could not put him in any better position than before he attempted to so apply the money. This is not a case where a payment was made without directions concerning its application. No payment of these policies could have been made during the life of Thomas E. Ward, and when he died and E. C. Ward collected the insurance money he was bound to apply it in satisfaction of that debt to secure which the policies were pledged—and this was the mortgage debt and perhaps another debt of \$90. The court should have required that this insurance money be applied first, to the discharge of the two \$500 notes secured by mortgage, and second, to the discharge of any other indebtedness on the part of Thomas E. Ward to E. C. Ward existing at the time the assignment of the policies was made.

Since the proper application of the insurance money will discharge the mortgage debt, the court will set aside the former judgment and enter one directing a sale of the property for the satisfaction of the bank's purchase money notes. When these are satisfied, one-half of the

balance realized by the sale belongs to the widow in her own right and in the remaining one-half she is entitled to a homestead.

Judgment reversed and cause remanded for further proceedings consistent herewith.

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### **Hurst, Jr. v. Winchester Bank, et al.**

(Decided June 12, 1913.)

#### **Appeal from Wolfe Circuit Court.**

**Contracts—Construction of.**—When the court comes to construe a writing, it will not be altogether controlled by the name that the parties have given it, but will look to the paper and determine for itself the nature and quality of the writing. If it is in fact a mortgage, although it may be called a deed, or is in truth a contract of sale and purchase, but designated a mortgage, the court, while giving due consideration to the acts of the parties in describing the paper, will not permit injustice or fraud to be practiced by following the title given to the paper by the parties, but will so construe it as to carry out what the facts show was their real intention in its execution.

J. J. C. BACH, GRANNIS BACH, J. M. TESTER and S. G. SAMPLE for appellant.

O'REAR & WILLIAMS and A. F. BYRD for appellees.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

In April, 1908, C. H. Loveland obtained from W. L. Hurst, Sr., an option on a large number of timber trees, and for some reason not shown, as the option contract is not a part of the record, the land on which the trees stood was divided into four boundaries, numbered 1, 2, 3 and 4. On June 2, 1909, a writing was made and entered into between C. H. Loveland of the first part and Day & McLin, parties of the second part. This writing recited that,

“In consideration of ten thousand dollars paid in cash by the second to the first party, and the further sum of five thousand dollars, to be hereafter paid and loaned by the second parties to the first party in monthly payments to be made as the first party manufactures and stacks the lumber on his yards, cut from the timber hereinafter described, in sums sufficient to cover the monthly

pay-roll and cost of operation, including cutting and hauling, until the sum of five thousand dollars has been thus paid in full, all of the said money including the said ten thousand dollars, to bear interest at the rate of six per cent per annum from the date loaned until paid, and all of said sums to be due and payable on or before the first day of September, 1912, with accrued interest, pursuant to the terms and conditions hereinafter stated, the first party does hereby grant, bargain, sell and convey unto the second parties, their heirs and assigns, in fee simple, all of the right, title and interest of the first party in and to the hereinafter described timber." \* \* \*

"To have and to hold all of the above described property unto the second parties, their heirs and assigns in fee simple, with covenant of general warranty; provided, however, that the first party shall have the right from time to time to make sales of any and all of the lumber and other products manufactured from said timber, or to contract in advance for same, and to secure thereon advancements of money from the purchaser, all to be subject to said mortgage thereon; and the second parties shall sign and deliver to the first party from time to time releases of such lumber as may be sold or contracted to be sold, from the effect and operation of said mortgage thereon, which shall be for the benefit of the purchaser, and any release signed by either of the second parties signing the firm name of Day & McLin shall be a sufficient release of such part of the property conveyed by this mortgage as therein specified, but to secure such release the first party shall furnish to second parties a full and complete statement of the lumber or other products to be sold or contracted for, and the terms of such sale or contract, and the amount of such advancements or advancement to be secured thereon which statement shall be subject to inspection and verification by second parties at first party's expense, as provided in the contract between the parties hereto of date June 1, 1909, relating to said timber, but the second parties shall within one week from the time they are furnished with such statement by first party, make whatever inspection or verification they may desire, and execute and deliver to first party said release, which release shall authorize the purchaser or party making advancements on said lumber to make all payments or advancements thereon by check or draft payable to the order of Day & McLin,

agents special account, at the Winchester Bank in Winchester, Kentucky, which checks or accounts shall be deposited to said account at said bank, which account shall be subject to checks and drafts, drawn by Day & McLin, agents, and countersigned by first party, which are drawn or made payable for the following purposes, namely:

"First: For the monthly pay roll and costs of manufacture and delivery on cars, including cutting and hauling, which shall include in said pay-roll the monthly salary to first party of \$150 per month.

"Second: For the payment to W. L. Hurst on the balance due him for boundaries or lots of timber remaining unpaid for under said option and purchase.

"Third: For payments on said loan made by second parties to first party above referred to, and second parties' salary provided for in contract of even date herein. \* \* \* But this mortgage is on the condition, however, that, should the first party or any one for him well and truly pay off and discharge the said debts and all interest thereon secured by this mortgage when due, then in that event this mortgage shall be and become null and void; else to be and remain in full force and effect."

In August, 1909, Loveland, for the purpose of procuring another loan of \$6,788, evidenced by several notes, and to further secure the payment of the ten thousand dollars referred to in the mortgage of June 2, 1909, mortgaged to Day & McLin a large quantity of lumber and personal property under substantially the same terms and conditions set out in the mortgage of June second.

On July 23, 1909, Loveland and the appellant, W. L. Hurst, Jr., entered into a contract, by the terms of which Hurst agreed to build tram roads, haul trees and lumber, and do other things for Loveland in connection with the manufacture of the timber he had secured in the option contract with Hurst, Sr., for a stipulated consideration, amounting to some \$4,500, all of which was paid by Loveland, except \$1,406.

It appears that Day & McLin negotiated the note for ten thousand dollars, executed to them by Loveland, to the Winchester Bank, and in 1912, the bank brought suit on the note against Loveland, Day & McLin, and also set up the mortgage executed by Loveland to Day & McLin to secure its payment, and asked for a judgment and



the enforcement of the mortgage lien on the property therein described. W. L. Hurst, Jr., was also made a party defendant to this suit for the purpose of requiring him to assert any interest he might have in the mortgaged property. In this suit Judgment went by default against Loveland, Day & McLin, and an order was made directing the sale of a sufficiency of the mortgaged property to pay the judgment.

It further appears from the judgment that William L. Hurst, Jr., had brought suit against Loveland on his hauling contract, and in that suit had obtained an attachment which was levied on some of the property covered by the mortgage, and the judgment recited that the issues between Hurst and the Winchester Bank were reserved for future adjudication.

After this Hurst filed an answer, counterclaim and cross-petition, in which he asserted "that at the time said arrangements and contracts were entered into the defendant, Loveland, had no money or means with which to pay for said timber, or to have it cut or hauled to his mill, or to manufacture it, or transport it to market, and that the contracts above set out were entered into in order that defendants, Day & McLin might advance to him the necessary money for said purpose, they to receive therefor a large bonus, to-wit: Six thousand dollars in addition to the six per centum interest on the money actually advanced by them.

"He says that upon the execution of these contracts, the defendants, Day & McLin, became interested in having the timber named in said writings cut and hauled to the mill of defendant, Loveland, and there manufactured into lumber and other forest products; and to enable the said Loveland to do so, it was stipulated in both of said writings that the funds arising from the sale of said lumber or other forest products manufactured from said timber, or any advancement received thereon, was to be applied, first: to the payment of said Loveland's monthly pay roll and cost of manufacture and delivery on cars, including cutting and hauling. He says that said stipulation was made in said writing for the benefit of whomsoever the defendants might employ to cut and haul said timber and manufacture and transport it to market; and that the defendants, Day & McLin, by accepting said contract containing said stipulation, impliedly promised and agreed to pay the compensation to

whomsoever said Loveland might employ for said purpose."

He further set out his hauling contract with Loveland, and averred that there was due him on account of said contract the sum before mentioned, and that he was entitled to be subrogated to the rights of Day & McLin, and by reason thereof he has a superior lien upon the lumber manufactured from said timber to secure the payment of his debt, interest and cost; and the plaintiff acquired whatever interest it has in or to said lumber, with notice of his lien.

He further averred "that by reason of the said McLin and the plaintiff having agreed to furnish the said money with which to pay for the hauling of said timber, and having received from him a valuable consideration therefor, they became and are liable to him jointly with the defendant, Loveland, for the amount the defendant, Loveland, promised and agreed to pay him for hauling said timber, to-wit, \$4,500, and that under the said contract they did furnish him the amount of \$3,093.73, so paid by them and the said Loveland, under said agreements and contracts, and that same was the only money furnished him by them for that purpose."

To this pleading a general demurrer was sustained, and the pleading dismissed. It is from this order of the court that Hurst prosecutes this appeal.

We have set out at more length than was perhaps necessary the writings executed by Loveland to Day & McLin, and the pleading of appellant asserting his right to a lien superior to the lien of Day & McLin on the mortgaged property but from these writings and pleadings it will be seen that the Winchester Bank contends that the writing executed by Loveland to Day & McLin on June 2nd was merely a mortgage to secure Day & McLin in the payment of money they had advanced to Loveland, and this being so, their mortgage lien is superior to the subsequent attachment lien of Loveland.

Upon the other hand, it is insisted for appellee, Hurst, that the writing between Loveland and Day & McLin, designated a mortgage, was really a contract of purchase and sale, and that Loveland, in employing the appellee, Hurst, to do the hauling, was acting as the agent of Day & McLin. It is further insisted that if Loveland was not acting as the agent of Day & McLin, the contract between them was made for the benefit of

appellee, and, therefore, he is entitled to recover thereon in his own name.

The writing between Loveland and Day & McLin, although it recites a good many details touching the agreements between them, was, we think, merely a mortgage to secure them in the payment of the money they had advanced to enable him to carry out the option contract under which he became the purchaser of the timber. It appears that Loveland had no means of performing this contract with Hurst. He was not able to pay Hurst the purchase price for the timber or to put the timber on the market, and secured from Day & McLin the money that would enable him to do both of these things. Under the circumstances, the only way in which Day & McLin could be reimbursed for the money they advanced was in manufacturing the timber and having the proceeds applied to the payment of their debt. To accomplish this end, and at the same time protect themselves, it is apparent that it was important under the circumstances that all money received by Loveland from the sale of the timber should be turned over to them, and that they should advance such sums as might be necessary to defray the expense of manufacturing the timber. It was for these reasons, we think, that the parties inserted in the mortgage the conditions relating to the manner in which the proceeds realized from sales should be accounted for and disposed of.

All of the mortgaged property was owned by Loveland, and the manufacture and sale of it was left entirely in his hands. Day & McLin were only concerned in the disposition of the proceeds realized from the sale to the extent that it might be necessary to protect their interest. Having these views of the writing entered into between Loveland and Day & McLin, we do not find anything in its terms or conditions that would authorize us to say that it is not what it purports to be, a mortgage to secure the payment of a debt.

We may also observe that in coming to this conclusion we have kept in mind the well-settled rule that a court, when it comes to construe a writing, is not to be controlled altogether by the name that the parties have given it, but will look to the paper and determine for itself the nature and quality of the writing. If it is in fact a mortgage, although it may be called a deed, or is in truth a contract of sale and purchase, although designated a mortgage, the court, while giving due considera-

tion to the acts of the parties in describing the paper, will not permit injustice or fraud to be practiced by following the title given to the paper by the parties, but will so construe it as to carry out what the facts show was their real intention in its execution.

The contract entered into between Loveland and Hurst relating to the management of the funds, and which was incorporated in the mortgage, was a matter entirely between them. Day & McLin were not parties to the contract between Loveland and Hurst, and it does not appear that they had anything to do with the making of this contract. It is true that the writing between Loveland and Day & McLin provided that the proceeds of timber sold should be applied, among other things, to defray the expense of cutting and hauling the timber, but this clause, as we have indicated, seems to have been inserted for the purpose of showing what disposition should be made of the money as between them, and not with the view of giving laborers any lien superior to the mortgage lien or binding in any manner Day & McLin for the payment of their wages.

The parties to this mortgage contract had the right to agree among themselves as to how the proceeds realized from a sale of the mortgaged property should be applied, and this arrangement was for their benefit alone. The contract was not made for the benefit of Hurst or others who might be employed by Loveland in manufacturing timber. In short, our conclusion that this writing was merely a mortgage disposes adversely of all the contentions made by appellee and establishes that the debt of the mortgagee must be first satisfied before Hurst can subject any of the mortgaged property to the payment of the debt due to him by Loveland.

Wherefore, the judgment is affirmed.

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### **Robertson, et al. v. Hines, et al.**

(Decided June 12, 1913.)

#### **Appeal from Warren Circuit Court.**

**Vendor and Purchaser—Pendency of Action to Settle Estate—Purchase from Heir.—Section 2084, Ky. Stats.—Under section 2084, Ky. Stats., one who purchases from an heir of an intestate, pending an action to settle the intestate's estate brought within six**

months from the time the estate descended, steps in the shoes of the heir, and acquires no interest in the real estate where the debts of the intestate and the costs of administration equal the proceeds of its sale.

W. E. GARTH for appellants.

SIMS & RODES for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

In the month of August, 1900, Leslie J. Clark died intestate, a resident of Warren County, Kentucky. He was the owner of certain lands in that county. He had three children, John Clark, Joe Clark and Agnes Amelia Clark, who married James Ragland. John Clark and Joe Clark survived the intestate, but at the time of his death Agnes Amelia Clark and her husband, James Ragland, were both dead, leaving surviving them Clark Ragland and Hardin W. Ragland, both of whom were of age. Upon the death of Leslie J. Clark, Byron Renfrew qualified as his administrator. On December 26, 1900, he brought an action for the settlement of the estate. Certain creditors holding mortgage and vendor's lien and other claims against the property were made parties. Hardin W. Ragland was also made a party defendant. At that time he was a non-resident and lived in Lebanon, Tennessee. Upon proper affidavit, R. C. P. Thomas was appointed warning order attorney to notify him of the nature and pendency of the action. On June 5, 1901, he filed a report that he had written several letters to Hardin W. Ragland and had received replies from him. He further stated that he had examined the papers in the case and from all the information he was able to obtain he was unable to make any affirmative defense for Hardin W. Ragland. The case was referred to the master commissioner and various claims allowed against the estate. The property was sold and J. H. Clark and J. G. Cason became the purchasers at the price of \$700. The purchasers failed to execute bond for the purchase price. On February 17, 1902, the property was again sold and T. R. Hines became the purchaser at \$500. Exceptions were thereafter filed to the same, but the sale was confirmed.

During the pendency of the above action Hardin W. Ragland and wife sold and conveyed his undivided one-sixth interest in the land to N. G. Robertson by deed,

duly acknowledged and delivered on March 19, 1901, and recorded in the office of the clerk of the Warren County Court on March 20, 1901. The consideration recited in the deed was \$150 cash.

On February 4, 1909, N. G. Robertson brought this action against the present owner of the land and others to recover an undivided one-sixth interest therein. On final hearing the petition was dismissed, and he appeals.

Plaintiff bases his right to recover on the fact that he was a bona fide purchaser of Hardin Ragland's interest without notice of the pendency of the action to settle his grandfather's estate. Section 2087, Ky. Stats., provides:

"When the heir or devisee shall alien before suit brought the estate descended or devised he shall be liable for the value thereof with legal interest from the time of alienation to the creditors of decedent or testator; but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for a valuable consideration, unless action is instituted within six months after the estate is devised or descended to subject the same."

At the time of the commissioner's sale of the land in question Hardin W. Ragland was before the court. The suit was instituted within six months after his interest in the estate descended to him. Passing the question whether or not Robertson had actual notice of the pendency of the action, he bought Hardin W. Ragland's interest during the pendency of the action. The suit having been brought within six months, the interest which he purchased was subject to the payment of the intestate's debts and the costs of the administration. In other words, he stepped into the shoes of Hardin W. Ragland and could assert no greater interest in the land than Hardin Ragland could assert. Mortgage liens and other claims against the estate, together with the costs of administration, consumed the property; therefore, Robertson acquired no interest in the land by virtue of the deed in question.

Judgment affirmed.

**Stewart, et al. v. Stewart, et al.**

(Decided June 12, 1913.)

**Appeal from Pike Circuit Court.**

1. **Action—Deed—Fraud—Assignment.**—The right of a vendor to avoid a deed on the ground of fraud practiced by the vendee is a mere personal right incapable of sale or transfer.
2. **Vendor and Purchaser—Deed—Fraud—Right of Purchaser to Set Aside Prior Deed of Grantor on the Ground of Fraud.**—An attorney who purchases from a grantor who has previously sold and conveyed the property, with notice of such prior deed, acquires no right to institute an action not authorized by his grantor, to set aside the former deed on the ground of fraud, and to prosecute such action in opposition to his grantor's wishes.
3. **Action—Right of—Assignment—Section 20 of the Civil Code.**—Section 20 of the Civil Code, giving to the person to whom the transfer or assignment is made the right to be substituted in the action if the right of the plaintiff be transferred or assigned during the pendency of the action, does not apply to a case where the assignment is made prior to the institution of the action and the action itself is unauthorized by the assignor. It is also limited to those cases where the right of action itself is a proper subject of assignment.

**STRATTON & STEPHENS** for appellants.

**CHILDERS & CHILDERS** and **HOBSON & HOBSON** for appellees.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.**

On April 18, 1911, Zebedee Stewart and wife sold and conveyed to Thomas Stewart his interest in a tract of land in Pike County, Kentucky. The consideration recited in the deed was \$100. On April 24th, he brought this action to have the deed set aside on the ground of fraud. Before defendant, Thomas Stewart, was summoned, his attorneys entered his appearance and tendered and offered to file an agreed judgment by which Zebedee Stewart released his right, title and interest in and to the land in controversy and consented that Thomas Stewart be adjudged the owner thereof. Pending the decision of the court on the entry of the agreed judgment, Zebedee Stewart filed an amended petition, changing in certain respects his allegations of fraud. E. D. Stephenson, his attorney, then filed a petition asking to be made a party. In this petition Stephenson pleaded that one

William Fields had purchased the land in controversy from Zebedee Stewart by title bond dated April 21, 1911, the consideration being \$25 in cash and the balance payable when the title to the land was perfected. On April 25, 1911, Fields, for the consideration of \$150, \$50 of which is recited to have been paid in cash, assigned and transferred the title-bond to E. D. Stephenson. Stephenson asked the right to prosecute the suit in his name, to final judgment. The allegations of the petition and amended petition of Zebedee Stewart were denied by answer, which further alleged that after the deed from Zebedee to Thomas Stewart had been recorded, Stephenson employed Fields to go to plaintiff and procure for him the title-bond of April 21, 1911; and it further alleged that the title-bond was obtained by fraud. The allegations of the petition of Stephenson to be made a party were also denied, and defendant, Tom Stewart, further pleaded that the suit was instituted and was being prosecuted without the knowledge and consent of Zebedee Stewart.

About the time of the institution of the suit by Zebedee Stewart against Thomas Stewart, he filed another suit in the Pike Circuit Court against K. B. Elswick for a partition of the land, alleging that he was the owner of an undivided one-eighth interest therein, while Elswick was the owner of the other seven-eighths. Plaintiff also set up a claim of \$4,000 for the use of his part of the land.

The two cases were thereafter consolidated and heard together. On final hearing the court held the agreed judgment to be valid and entered an order dismissing the petition of Zebedee Stewart and the petition of E. D. Stephenson, and adjudged K. B. Elswick to be the owner of the land. From that judgment this appeal is prosecuted.

The record discloses the following facts: The deed from Zebedee Stewart and wife to Thomas was executed on April 18, 1911, and recorded on April 20, 1911. The title-bond from Zebedee Stewart to William Fields was executed on April 21, 1911. The suit was instituted on April 22, 1911. The title-bond from Zebedee Stewart to Fields was assigned to Stephenson on April 25, 1911. On May 5, 1911, Zebedee Stewart and wife and Thomas Stewart deeded the land in controversy to K. B. Elswick. This deed was lodged for record on May 6, 1911. On the same day Zebedee Stewart assigned to one J. E. Ratliff all his interest in the title-bond which he had ex-



executed to William Fields on April 21st. The agreed judgment dismissing the action was signed by Zebedee Stewart on May 9, 1911, in the presence of four witnesses.

The evidence is very brief. It appears that Thomas Stewart went to Zebedee, and telling him that he had a share in the land, procured him to execute the deed of April 18, 1911. No money was paid to Zebedee at the time, but Tom Stewart told him he would pay him as soon as he sold the land. Zebedee testifies that he did not authorize the bringing of the suit and did not know the suit had been brought. When he made the title-bond to Fields he received \$25 in cash, which he subsequently returned. He was paid the consideration of \$625 when he, together with Thomas Stewart, executed the deed to Elswick. He was willing for this transaction to stand. It further appears that the notary who took Zebedee Stewart's acknowledgement to the title-bond to Fields, told Fields of the fact that Zebedee had conveyed the land to Tom Stewart. The notary also testifies that the \$25 cash payment was paid by the check of Stephenson. Furthermore, the deed of April 18, 1911, was on record when the title-bond to Fields was executed.

It will be seen from the foregoing evidence that Stephenson was in no sense a bona fide purchaser. His representative, Fields, not only knew of the deed to Tom Stewart, but that deed was actually on record at the time of the purchase of the land by Fields. Zebedee says the suit was unauthorized, and there is no evidence to the contrary. No creditors are involved. The question is, may an attorney, with knowledge of the fact that a party has parted with his title to property, purchase the property and maintain an action in his grantor's name, in opposition to the latter's wishes, to have the deed from his grantor set aside on the ground of fraud. A conveyance induced by false and fraudulent representations is not void, but only voidable. As a general rule it is only voidable on the motion of the party defrauded. The right to set aside a deed on the ground that it was obtained by fraud is usually personal to the grantor. When Stephenson purchased from Zebedee Stewart he purchased with knowledge of the fact that Zebedee had no title. There was left in Zebedee only a right of action against Thomas Stewart to have the deed set aside. That right of action was one which Zebedee Stewart could assert or not as he saw fit. It was not the subject of assignment. As a matter of fact, the property was conveyed

to Stephenson's representative before suit was brought. The fact that Stephenson purchased the property and thereafter, without authority, instituted an action in the name of Zebedee Stewart to have the deed to Tom Stewart set aside, conferred on Stephenson no right thereafter to prosecute the action in the face of Zebedee Stewart's election to ratify the deed. *Jones v. Hill*, 9 Bush, 692; *Crocker v. Bellangee*, 6 Wis., 645; *Milwaukee & St. Paul Railroad Co. v. The Milwaukee & Minnesota Railroad Co.*, 20 Wis., 174. Section 20 of the Civil Code, giving to the person to whom the transfer or assignment is made the right to be substituted in the action if the right of the plaintiff be transferred or assigned during the pendency of the action, does not apply to a case where the assignment is made prior to the institution of the action and the action itself is unauthorized by the assignor. It is also limited to those cases where the right of action itself is a proper subject of assignment.

Judgment affirmed.

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### **Bosworth, Auditor v. State University, et al.**

(Decided June 13, 1913.)

Appeal from Franklin Circuit Court.

1. **Corporations—Action of State Institution Which is a Corporation—Employment of Counsel.**—The action of a State institution which is a corporation authorized to sue and be sued, will not be dismissed because the attorney bringing the action has not been employed as provided in Subsection 5 of Section 112 Ky. Statutes.
2. **Constitutional Law—Experiment Station of State University—Act Providing For.**—The act of March 11, 1912 is not invalid under section 51 of the Constitution on the ground that it amends the act of March 21, 1910, without publishing it at length, the act of 1912 simply enlarging the powers of the experiment station.
3. **Interest Bearing Warrants.**—The rule laid down in *Rhea v. Newman*, 153 Ky., 604, as to the issuance of interest bearing warrants, when there were already outstanding such warrants beyond the amount of \$500,000 over and above the cash in the treasury, is approved.

JAMES GARNETT, Attorney General for appellant.

STOLL & BUSH for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Affirming.

By an act approved March 11, 1912, the General Assembly appropriated to the Agricultural Experiment Station of the State University at Lexington, Kentucky, for the current fiscal year and for each succeeding year thereafter \$50,000 to be paid quarterly to the treasurer of the experiment station out of the moneys in the treasury of the Commonwealth of Kentucky; and the Auditor for the payment thereof was directed to draw his warrant upon the Treasurer as in all other claims against the Commonwealth. The Auditor, Henry M. Bosworth, declined to issue a warrant for money due the experiment station under the act and this suit was brought to compel him by mandamus to issue it. A motion to dismiss the action was made by the Attorney General upon the ground that the State University being a State institution had no authority to employ counsel without the consent of the Attorney General, the suit having been brought by Stoll and Bush as attorneys for the plaintiff. Subsection 5 of section 112 of the Kentucky Statutes is as follows:

“The Attorney General and his assistants shall attend to all litigation and business in or out of the State, required of him or them under this act, or other existing law or laws hereinafter enacted, and also any litigation or business that any State officer may have in connection with or growing out of his official duty; and no State officer, board or trustees or the head of any department or institution of the State shall have authority to employ or to be represented by any other counsel or attorney-at-law, unless an emergency arises, which, in the opinion of the Attorney General requires the employment of other counsel, in order to properly protect the interest of the Commonwealth, in which event the Attorney General shall, in writing, setting forth the reasons for such employment, request the Governor to employ such additional counsel. Before such employment, said written requests shall be filed in the office of the Secretary of State, and shall be a public record, and a copy thereof shall be retained and kept on file in the office of the Attorney General. Before such counsel is employed his fee and compensation shall be agreed upon and fixed by written contract by the Governor and said counsel, subject to the approval of the Attorney General, and copies

thereof shall be kept on file in the office of the Attorney General and the Secretary of State."

The purpose of this provision is to protect the State or any department or institution of the State from having to pay counsel fees. If Stoll and Bush were asserting a fee against the experiment station, the question sought to be raised by the motion would be presented. But it was not the purpose of the statute to prevent an institution of the State from bringing a suit to test its right when the Attorney General was unwilling to employ other counsel. In this case the Attorney General represents the Auditor, and it was not the purpose of the statute to prevent such a suit as this being brought. The plaintiff has capacity to sue and having capacity to sue, may maintain the action. The motion to dismiss the action as improperly brought, was therefore correctly overruled.

It is also insisted by the Attorney General that the act of March 11, 1912 is invalid under section 51 of the Constitution which provides:

"And no law shall be revised, amended, or the provisions thereof extended, or conferred by reference to its title only, but so much thereof as is revised, amended extended or conferred, shall be re-enacted and published at lenth."

It is insisted that the act of March 11, 1912, is an amendment to the act approved March 21, 1910, and that that act is not re-enacted or published at lenth. The act of March 21, 1910, is entitled "An act to establish a plant for the preparation of hog cholera serum and for the distribution of same to the farmers of the State." In the preamble the prevalence of hog cholera and the necessity for the serum is set out and then it is enacted that at the experiment station a plant for the manufacture of the serum shall be established; \$2,000 is appropriated for the purpose of installing the necessary plant. This is the sum of that act. (See Acts, 1910, p. 151.) The act of March 11, 1912, is entitled "An Act to benefit the Agricultural Experiment Station of the State University, Lexington, Kentucky, appropriating money and providing revenues for the maintenance of said Experiment Station and for conducting experiments in the various lines of Agriculture, and to meet the increased demands made upon it as a public institution." (See Acts, 1912, p. 134.) In the preamble to the act the reasons for its enactment are set out and it is provided in the act that the money thereby appropriated shall be used for the

purpose of making field experiments in the several sections of the State to ascertain what crops and treatment are best suited to each, to discover the best methods of orchard treatment, to conduct investigations, to develop the beef, pork and mutton producing interests of the State, to devise feeding experiments, to demonstrate the most successful combination of stock foods, to investigate live stock conditions both at home and abroad, including both horses and cattle; to conduct investigations for the advancement of the poultry interests of the State, and a number of other like matters. The act of 1912 is in no sense an amendment of the act of 1910. It enlarges the Agricultural Experiment station, but it does not revise the act of 1910. The validity of such legislation was upheld by us in *Purnell v. Mann*, 105 Ky., 87; *Com. v. Reinecke Coal Co.*, 117 Ky., 855; *Murphy v. City of Louisville*, 114 Ky., 762; *Herndon v. Farmer*, 114 Ky., 200; *Weimer v. Com'rs.*, 124 Ky., 383; *Mark v. Bloom*, 141 Ky., 474.

Lastly it is insisted that there was on April 30, 1913, outstanding warrants amounting to \$2,024,476.50 and only \$229,820.32 in the treasury; that these warrants represent sums which the Commonwealth of Kentucky is bound to pay, and that in the aggregate these outstanding warrants over and above the cash in the treasury amount to a sum in excess of \$500,000. On this question the case is not to be distinguished from *Rhea v. Newman*, 153 Ky., 604. In that case we fully considered the constitutional provisions relied on and held them not applicable. We adhere to the conclusion we then reached.

The circuit court having properly awarded the mandamus it follows that his judgment must be affirmed.

Judgment affirmed.

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## **Illinois Central Railroad Company v. Carter.**

(Decided June 13, 1913.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Third Division).

1. **Master and Servant—Order of Superior—Effect of—Contributory Negligence.**—Where a wrecking crew bound for a wreck two and one-half miles distant is composed of twenty-five or thirty men, and it is necessary for some of them to find places on the engine

elsewhere than in the cab, an order by the foreman in charge to "ride the engine" authorizes one of their number to make a choice between riding alone on the cross-beam of the pilot or riding with others on the coal on the tender, also a position of danger, and therefore to take a position on the cross-beam, unless such position was so obviously dangerous that an ordinarily prudent person would have refused to take it.

2. Same—Dangerous Place—Order of Superior—Obvious Danger.—Where the engineer of an engine bound for a wreck has been informed of the wreck and knows where it is, and the wreck is only two and one-half miles distant and the track between the engine and the wreck is closed, and no other collision is to be anticipated, it cannot be said as a matter of law that the position of one who, in obedience to the order of the foreman in charge to "ride the engine," securely fixes himself on the crossbeam of the pilot in preference to riding with other employees on the coal on the tender, is so obviously dangerous that a person of ordinary prudence would have refused to take it.

L. A. FAUREST, C. L. SIVLEY, and TRABUE, DOOLAN & COX for appellant.

O'DOHERTY & YONTS for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

In this action for damages for personal injuries against the Illinois Central Railroad Company plaintiff, Shelby Carter, obtained a verdict and judgment for the sum of \$8,000. The railroad company appeals.

The only error relied upon is the failure of the trial court to direct a verdict in favor of the defendant.

In the month of September, 1910, plaintiff was a laborer in the service of the railroad. He lived at Central City and was a member of an extra labor crew, whose foreman was John Nunnelly. On the night of September 20, 1910, there was a wreck on defendant's road at White Plains, a point fifty-one miles south of Central City. Nunnelly received orders to get together his men and other men for the purpose of taking them to the wreck. He got together two gangs of workmen, in all between twenty-five and thirty men. They were picked up at Central City by No. 103, a fast passenger train bound for Memphis. The men were also accompanied by Greer, another foreman, and by McNamara, the road supervisor. From Central City to Bakersport, a point two and one-half miles from the wreck, the men rode in the smoker. The train was in charge of Conductor Hansborough.

While there is a conflict in the evidence, plaintiff and some of his witnesses say that before reaching Bakersport, Hansborough told the men, Carter among them, that they would have to get out of the smoker at Bakersport and ride upon the engine to the wreck at White Plains. At Bakersport the passenger train was placed on a siding. As soon as this was done the men left the smoker and got out on the platform. There McNamara, the road supervisor, who was in charge of the men, repeated the order to ride on the engine. The mail car and baggage car were between the smoker and the engine. The night was dark and foggy. The men started forward in the direction of the engine. Before they had gone far, McNamara and Nunnally changed their minds and the latter told the men to go in the baggage car instead of the engine. Plaintiff, who had gone forward to the engine, did not hear the order. Plaintiff claims that he knew that only a few of the men could get in the cab of the engine and that the rest of them would have to ride either on the tender, which was filled with coal, or on the pilot, the position which he subsequently took. Believing that it would be safer to ride on the pilot instead of on the tender, he took a position on the cross-beam back of the pilot. There was a bar, of an elevation of about three and one-half inches, which extended across the beam. Upon this bar were iron standards, which supported the boiler. He sat on the beam with his back against the left standard, and his legs over the iron bar, and his feet hanging down. He caught hold of the bar. While plaintiff was in this position the engine and two cars proceeded to the wreck. The engine ran into the wreck, and plaintiff was so badly injured that both of his legs had to be amputated. It is not insisted that the collision was not the result of the negligence of defendant's employees. It was due either to the failure of the employees of the wrecked train to properly protect that train, or to the engineer's lack of reasonable and proper caution in proceeding to the wreck, of which he had been advised.

It is the contention of the defendant that even if it be conceded that an order was given by a superior officer to the men, including plaintiff, to ride on the engine, such an order cannot be fairly construed as a direction to ride on the pilot of the engine, and that plaintiff, by taking a position on the pilot instead of in the cab or on the tender, voluntarily chose a dangerous place, when a safer place was provided, and unnecessarily exposed himself to dan-

ger. It may be conceded that it has been held in a number of cases that the cross-beam or pilot is manifestly and obviously a most dangerous place on a forward moving engine, and one who voluntarily takes that position, when warned not to do so, or when his duties do not require him to do so, needlessly exposes himself to danger, and is not entitled to recover, where the railroad company furnishes other places where he can ride in safety. *B. & P. R. Co. v. Jones*, 95 U. S., 439; *Warden v. L. & N. R. R. Co. (Ala.)*, 14 L. R. A., 552; *Shannon's Admr. v. L. & N. R. R. Co.*, 70 S. W., 626; 26 Cyc., 1249; *Thompson on Negligence*, Sec. 5621; *Atchison, Topeka & Santa Fe Railroad Co. v. Tindall (Kan.)*, 2 Am. Neg. Rep., 141. The facts here present a different case. While ordinarily a direction to ride on the engine might not authorize an employee to get on the cross-beam of the pilot, yet the order in question must be considered in the light of the circumstances. According to plaintiff's testimony there were twenty-five or thirty men in the crew. All of them could not have taken positions in the cab. It was necessary for some of them to ride on other parts of the engine. Some of them would have had to ride on the tender. The tender was full of coal. The tender rocks considerably; the coal is liable to roll about. If some of the men had to ride on the tender, plaintiff, being one of the younger men, had a right to consider the position that he would take on the engine from the standpoint of being required to ride on the tender. It cannot be said as a matter of law that a tender loaded with coal and crowded with men is a much less dangerous place to occupy than the cross-beam on the pilot when occupied by only one man. Each place is dangerous, and it is not a case of a choice between a dangerous and a safe place. Our conclusion is that the order to ride on the engine, considered in connection with the number of men who had to ride and the necessity for many of them to find other places than in the cab of the engine, fairly authorized the plaintiff to make a choice between riding alone on the cross-beam or riding with others on the tender, also a position of danger, and, therefore, to take a position on the cross-beam, unless such position was so obviously dangerous that an ordinarily prudent person would have refused to take it. While ordinarily it may be true that a position on the cross-beam or pilot of an engine is one of extreme danger, yet the fact that an employe has been injured while in such position is not always conclusive on the question of contributory



negligence. The question is, was the result an ordinary and likely consequence which should have been anticipated by a person of ordinary prudence? The engineer had been informed of the wreck. He knew where the wrecked train was. It was his duty in proceeding to the wreck to keep a lookout and to exercise ordinary care to discover the wreck and avoid a collision. The track between the engine and the wreck was closed. A rear end collision was just as probable as a front end collision. Plaintiff secured himself in such a way that he could not be jostled off. The engine had only two and one-half miles to go. In seating himself on the cross-beam he had a right to take these facts into consideration, and it cannot be said that he should have anticipated that the engineer, in going to the wreck, of which he had been informed and which was only two and one-half miles away, would have been so grossly negligent as to run his engine into the wreck. Considered in the light of these facts, we cannot say as a matter of law that plaintiff's position was so obviously dangerous that an ordinarily prudent person would have refused to take it. It was a question for the jury.

It follows that the peremptory instruction asked for by defendant was properly refused.

Judgment affirmed.

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### Forquer v. Bovard, et al.

(Decided June 13, 1913.)

#### Appeal from Henry Circuit Court.

1. **Deeds—Construction—Defeasible Fee.**—Where the habendum clause in a deed is "to have and to hold the same unto the said Isaac W. Kelly and his heirs; but if the said Isaac W. Kelly die without issue then to the said Griffin Kelly and his heirs," the grantee acquires a defeasible fee, which he may devise in the event that he dies leaving issue.
2. **Deeds—Restraint on Alienation.**—The language of a deed imposing certain restrictions on alienation examined, and the restraint held to apply only during the lifetime of the grantee, or after his death in the event that he died without issue.
3. **Wills—Construction.**—The testator directed that the remainder of his estate be equally divided among his children. He then added the following clause: "I also entail the land on and during their natural life with the right to will the same." Held, that

the latter provision being meaningless and unintelligible did not limit, diminish or qualify the estate devised, and that the children of the testator acquired a fee under the will.

TURNER & TURNER for appellant.

H. K. BOURNE for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

On February 1, 1913, plaintiffs, Sallie K. Bovard and John Bovard, sold to defendant, L. G. Forquer, a tract of land located in Henry County, Kentucky. By the contract, which was in writing, plaintiffs obligated themselves to make to the defendant a good and vendible title on or before March 1, 1913, and deliver to him the possession of the land. In conformity with their contract, they placed the defendant in possession and tendered to him a deed to the property. Defendant declined to accept the deed and pay for the property, and plaintiffs brought this action for specific performance. The defense is based on an allegation that plaintiffs' title was defective. On final hearing, the chancellor gave judgment in favor of plaintiffs, and the defendant appeals.

The land in controversy is a part of a tract of 142½ acres of land which Griffin Kelly and his wife conveyed to their son, Isaac W. Kelly by deed dated May 11, 1871. Griffin Kelly died testate in the year 1887. He appointed his two sons, Isaac W. and Clinton Kelly his executors. The tract of land in controversy was not mentioned in the will. Isaac W. Kelly died in the year 1910. He left a will by which he devised the property in question to his children. In the division of this estate plaintiff, Sallie K. Bovard, obtained as her share the land in controversy.

The questions presented are: (1) What character of estate did Isaac W. Kelly acquire under the deed from his father, Griffin Kelly? (2) Did he have the right to devise the property? (3) What character of estate did his children acquire under his will?

The deed of May 11, 1871, is between Griffin Kelly and his wife of the first part, and Isaac W. Kelly of the second part. The granting clause is as follows:

"That for and in consideration of the sum of one dollar cash in hand paid, the receipt of which is hereby acknowledged as well as in consideration of natural love and affection the said first parties do give grant, bargain, alien convey and confirm and by these of warranty have

given, granted bargained, alienated, conveyed and confirmed unto the said Isaac W. Kelly the following described property, viz:” (Here follows description.)

The habendum clause is as follows:

“To have and to hold the same unto the said Isaac W. Kelly and his heirs: but if the said Isaac W. Kelly die without issue then to the said Griffin Kelly and his heirs without power of alienation or encumbrance during the life time of said Isaac W. Kelly or for twenty-one years after his death unless by and with the consent of the said Griffin Kelly in writing expressed. But if after the death of the said Griffin Kelly the said Isaac desires to sell said property he may do so upon giving written notice of his intention to the executors of Griffin and upon the expressed condition that the proceeds of such sale shall be invested in other real estate subject to the same conditions and limitations as the property hereby conveyed and the purchaser is responsible for such re-investment and any such sale shall be void unless such investment is actually made.

“Provided always that the estate and premises hereby conveyed shall be forever free from and not subject to any debt or liability whatever that may hereafter be contracted or incurred by the said Isaac W. Kelly and provided always that there is excepted from the restraint against alienation and encumbrance all that portion of the land hereby conveyed which lies on the south side of New Castle and Bethlehem pike, the title to which is hereby vested absolutely in said Isaac W. Kelly with full power to dispose of same.”

It will be observed that the habendum clause is “to have and to hold the same unto the said Isaac W. Kelly and his heirs: but if the said Isaac W. Kelly die without issue then to the said Griffin Kelly and his heirs, etc.” It is clear that under the deed in question Isaac W. Kelly took a fee to the property conveyed, subject to be defeated by his death without issue. In other words, he took a defeasible fee. As a matter of fact, he died leaving issue. The contingency on which the estate was to be defeated never happened. He therefore had the right to devise the property unless the restrictions imposed by the deed prevented him from doing so. It will be observed that the restraint on alienation is not absolute. The deed simply provides that before the property can be alienated, the consent of Griffin Kelly or his executors shall be obtained in writing. The law does not favor restraints on

alienation, and in the case of doubt will adopt that construction which favors the right to convey. Here the restraints attempted to be imposed are very ambiguous and uncertain. Bearing this fact in mind, we conclude that the grantor did not intend the restraint to apply after the death of Isaac W. Kelly, unless he died without issue. The deed did not attempt to impose any restraint upon his right to devise the property. We therefore conclude that he did have that right, and that the property in question passed to his children by virtue of his will.

The will in question, besides containing other provisions not necessary to be mentioned, contains the following:

"Sec. 7: The rest of my remaining estate I desire divided equally, among my children except in the case of Mrs. Rebecca J. K. Samuell I have already given \$800 in cash consequently all the rest of the children must be made equal to her and the balance left then to be equally divided among all of my children. I also entail the land on and during their natural life with the right to will the same."

It will be seen that after devising his children the fee in the land, he adds the provision "I also entail the land on and during their natural life with the right to will the same." In our opinion, the language employed means nothing. Where the testator devises a fee, the estate will not be held to be limited, diminished or qualified by a subsequent provision which is altogether unintelligible. We therefore conclude that the children of Isaac W. Kelly acquired a fee in the land devised by him, and that the deed from his daughter, Sallie K. Bovard, and her husband, James Bovard, was sufficient to vest in defendant a good title to the tract of land in controversy.

Judgment affirmed.

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### **Cincinnati, New Orleans & Texas Pacific Railway Co. v. Reed.**

(Decided June 13, 1913.)

Appeal from Lincoln Circuit Court.

1. Railroads—Action for Personal Injuries—Evidence.—The statement of a witness on cross examination that the engineer from his cab could see the crossing where the injury occurred, means

nothing more than one from the cab of the engine having an unobstructed view could have seen the crossing by the light of the engine's head light, and was not a contradiction of the engineer's statement that he could not see the crossing because of a curve, and was harmless from any view.

2. Instructions—Action for Personal Injuries—Evidence of Intoxication of Plaintiff—Submission of Issue.—While in an instruction defining ordinary care, evidence of plaintiff's intoxication at the time of the injury was not submitted to the jury, this phase of the matter was properly set forth in an instruction on contributory negligence, and the two instructions taken together fairly submitted these issues to the jury.
3. Railroads—Speed of Train—Negligence in Failing to Have Headlight or to Give Signals.—The right of recovery being based upon the negligence in failing to have a headlight, or to give the signals, the reference in the instruction to the speed of the train was not prejudicial.
4. Railroads—Action for Personal Injuries—Verdict—Evidence.—In an action against a railroad company for personal injuries, where the plaintiff's skull was fractured and a leg and arm broken, evidence examined and held that a verdict for \$6,000 is sustained by the evidence.

JOHN GALVIN, J. W. ALCORN and K. S. ALCORN for appellant.

ROBERT HARDING, JOHN W. RAWLINGS, and EMMET PURYEAR for appellee.

#### OPINION OF THE COURT BY JUDGE TURNER—Affirming.

On the night of the 21st of October, 1911, shortly after dark, appellee while going south in a buggy on the Hustonville and Danville turnpike near a small village called Milledgeville was struck by one of appellant's north bound freight trains at a grade crossing. His skull was fractured, one leg was broken and one arm broken. He brought this suit for damages, and recovered a judgment for \$6,000, from which the company appeals.

Appellee was a resident of Casey County, and lived about twelve or fourteen miles from Junction City, and on the day in question drove from his home to Junction City in company with one Dr. Settles. They arrived at Junction City in the middle of the afternoon, and appellee remained there until nearly or about dark when he started to return home alone, and after going several miles was struck at the crossing near Milledgeville.

He sets out in his petition three forms of negligence:

- (1) That the train was running at a dangerously high rate of speed.

(2) That it was night time and the engine had no headlight burning.

(3) That the statutory signals were not given as the train approached the crossing.

The answer of the defendant denied negligence in either of the respects named, and in a separate paragraph pleaded contributory negligence upon the part of appellee.

The first error complained of is that the court permitted the witness, Eph Caldwell, to state on cross-examination that the engineer from his cab could see the crossing in question, when the witness himself admitted that he had never made an observation from the cab at that point. It is insisted that this was violative of the rule that a witness may not give opinion evidence concerning subject matter as to which he has made no observation. This evidence seems to have been regarded as particularly harmful in view of the fact that the engineer had testified that it was impossible for him to see this crossing because of a curve in the track, and because his view was wholly obstructed by the boiler in front of him.

But an examination of the testimony of the witness, Caldwell, shows that he was only permitted to say that one having an unobstructed view from the cab could have seen the crossing. His testimony on this point means nothing more than that one from the cab of the engine having an unobstructed view could have seen the crossing by the light from the engine's headlight. His testimony was in no sense a contradiction of the engineer's statement, and was harmless from any view.

There was considerable evidence introduced tending to show that the appellee was intoxicated at the time of the accident, and it is urged for appellant that the court in its instruction defining ordinary care, ignored this evidence, and failed to require of appellee such care for his own safety as an ordinarily prudent person would have exercised under similar circumstances when sober; and refers to the cases of the *City of Covington v. Lee*, 28 R., 493; *L. & N. v. Gardner*, 140 Ky., 772. Undoubtedly one who is intoxicated to such an extent as to render him incapable of exercising ordinary care for his own safety, will be deemed guilty of contributory negligence so as to defeat a recovery in such case; but this phase of the matter was fully and properly set forth in another instruction on the subject of contributory negligence, wherein the jury was told that if he was at the time so much under

the influence of liquor as that he was incapable of exercising, and did not exercise for his own safety that degree of care which would have been exercised by a sober and ordinarily prudent man under similar circumstances, he could not recover. The two instructions taken together fairly submitted these issues to the jury.

The evidence is that Milledgeville is a small village containing about one hundred and fifty (150) people, and about a mile south of it is another village, Moreland, of about the same size, and that the crossing in question is at the outskirts of Milledgeville on the south, and that there are some scattered houses along the route between the two towns; it is urged as ground of reversal that the court erred in referring in its instruction to the speed of the train, and erred in not defining what it meant by using the expression "high and dangerous rate of speed" in the first instruction.

It is true that the law only requires that the speed of trains be slackened upon their approach to crossings in or near populous cities and towns where the presence of persons on the track may be reasonably anticipated, and that this rule does not apply to ordinary country crossings. (*L. & N. v. Molloy*, 122 Ky., 219); but an analysis of the instruction given in this case discloses that while there was carelessly used in the opening part of it the expression that if "the train of the defendant company came to the crossing while plaintiff was crossing same at high and dangerous rate of speed," &c., yet in the latter part of the instruction the plaintiff's right to a recovery is wholly predicated upon "the failure of the defendant to have a head-light on its engine \* \* \* or because of the failure of the defendants to give reasonable warning \* \* \* by ringing its engine bell, or sounding its engine whistle."

It would have been much better to have left out of the instruction any reference to the speed of the train, but as the right of recovery was wholly based upon the negligence in failing to have a headlight, or in failing to give the signals, we do not think it prejudicial in this case. It is clear from the whole record that the verdict was based upon the alleged negligence in one or the other of these respects; in fact the speed of the train was given no prominence whatever at any stage of the trial, and there was no evidence introduced by either party upon that subject except incidentally.

It is not the modern policy of the courts to seize upon careless expressions in instructions and grant new trials upon such grounds; in fact under the very terms of our Code of Practice, we are authorized to reverse judgments only where there has been an error prejudicial to the substantial rights of appellant.

Lastly it is said the verdict is flagrantly against the evidence, but this cannot be sustained. On each of the three vital issues in the case: (1) Whether the headlight was burning, (2) Whether the signals were given, (3) Whether the appellee was drunk, there was strong and convincing testimony introduced by each party. While the number of witnesses testifying for the parties on the three issues varied, and the preponderance may have been with the appellant on one or more of them, they were all fairly submitted to the jury, and we do not feel justified in disturbing the verdict.

On the whole case we see no substantial error to the prejudice of appellant.

Judgment affirmed.

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### **Mengel Box Company v. Hall.**

(Decided June 13, 1913.)

#### **Appeal from Fulton Circuit Court.**

1. **Damages—Action for Breach of Contract—Contract of Employment—Change of Contract—Evidence.**—Following an injury to appellee resulting in the amputation of a leg, appellant's adjuster paid him \$260, and as appellee contends entered into a contract with him to give him employment for life. Upon being informed by the foreman that the appellant could not employ him, he instituted this action for damages for breach of contract. Upon the issue as to the change in the contract, the adjuster stated in general terms that the contract as written was the true contract, but he does not deny that he made the interlineation in it or that he read out the contract as claimed by appellee and his witness who was present at the time of its execution.
2. **Contracts—Action for Breach of—Instructions.**—The contention of appellant that a peremptory instruction should have been given because appellee had not shown that he had applied to the manager and principal agent for employment cannot be sustained because the evidence shows there are sub-managers over the different departments of appellant's large business, and that appellee did apply several times to the manager of the department in which he had worked.



3. Damages—Action for Breach of Contract—Instructions.—There is no merit in the contention that the court improperly refused to instruct the jury to find for defendant if they believed the adjuster had no authority to make the settlement for the reason that there was no evidence upon which to base such an instruction.

TYLER & AMBERG for appellant.

HESTER & HESTER for appellee.

**OPINION OF THE COURT BY JUDGE TURNER—Affirming.**

On the 20th of June, 1911, appellee while employed by appellant was injured, as a result of which it was necessary to amputate one of his legs.

After about eight weeks he was able to get around again on his crutches, and returned to work for appellant, but at the end of about two weeks he again had trouble with his leg, and was compelled to quit.

About the time he began to recover from this back set, he was threatening to institute suit against the company, negotiations looking to a settlement were pending between him and E. L. Howard, the company's adjuster, whose business it was to settle such claims. Finally on the 12th of September they reached an agreement as alleged by appellee, whereby the company was to pay him \$260 in cash and all of the expenses of his illness, and give him employment for life either in feeding a glue machine or marking bundles in its factory at the same wages he was receiving when injured which was \$1.50 per day.

After reaching these terms, Howard left appellee's home, went to the office of the company and returned with a check for \$260, and a printed form of contract, the blank spaces in which were filled out in his (Howard's) hand writing. The writing was signed by appellee in the presence of his wife, Howard, and his step-daughter, Miss Hatley.

As soon as appellee was able, he applied to the foreman under whom he had formerly worked for his position, and he was referred by him to another, who in turn sent him back to the foreman. This occurred several times, and he was finally informed by the foreman that they were under no obligation to employ him, and had no place for him. Thereupon, he instituted this action for damages for breach of the contract, and the jury returned a verdict for \$2,500 in his favor, and the company appeals.

The company in its answer denied that there was any contract of employment, and produced the written contract which had nothing in it about any employment whatever. The original contract was filed with the answer, and on that same day the plaintiff filed an amended petition wherein he alleged that he had just seen the written contract for the first time since its execution, and that the defendant's agent had fraudulently represented to him at the time of its execution that it contained the employment agreement, and had at the time read over said contract to the plaintiff before he signed the same as containing said agreement, and that he believed at the time he signed it that it did contain the same, and that Howard falsely read the contents of said writing to the plaintiff for the fraudulent purpose of deceiving him. The affirmative allegations in this amendment were by agreement traversed on the record.

The evidence of the plaintiff and Miss Hatley is that after Howard came back from the factory with the check and contract, that appellee said he wanted to read the contract before he signed it, and that Howard said that he was in a hurry, that he wanted to catch a train and that he would read it; that after he (Howard) got back to the house, he made some interlineation in the contract, and then read it aloud, and read it as containing an agreement to employ appellee for life at \$1.50 per day, either in feeding a glue machine or marking bundles, and that immediately after it was signed, Howard took the contract and left.

Howard's testimony states in general terms that the contract as written was the true contract between the parties, but does not specifically deny either that he made an interlineation while at appellee's house, or that he read out the contract as claimed by appellee and Miss Hatley.

The appellant's contention that a peremptory instruction should have been given upon the ground that appellee had not shown that he had ever applied to the manager and principal agent of appellant to give him employment and had never been denied such employment by such manager and principal agent, cannot be sustained.

The evidence is that appellant's business is a very large one, and is sub-divided in such way that certain sub-managers or bosses have charge of their respective departments, and that appellee did apply several times to the manager or boss of the department in which he

had formerly worked, and that said sub-manager had the authority to employ and discharge those under him.

Appellant also complains that the court refused to instruct the jury as requested by it that if they believe Howard had no authority to make the settlement as alleged, that they should find for the defendant, but there was no evidence upon which to base any such instruction; the evidence of Howard himself showed that he was the regular adjuster of such claims against the company, and had adjusted nearly all the claims of that character against the company for two years.

The instructions given by the court fairly presented the issues and are not seriously objected to.

It is shown by appellee that he sought other employment, but that by reason of his crippled condition there was very few things that he could do, and that his earning capacity was very limited; he was only twenty-four years of age at the time of the accident, and was a strong and healthy man, then earning \$1.50 per day.

Under these circumstances the judgment for \$2,500 can in no sense be considered excessive.

Judgment affirmed.

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## Chesapeake & Ohio Railway Company v. Robbins.

(Decided June 13, 1913.)

### Appeal from Bath Circuit Court.

1. Damages—Overflow From Obstruction of Creek—Negligence—Measure of Damages.—The claim of damages asserted by appellee for the overflow of her two lots and the buildings thereon, having resulted from the obstruction of the waters of two creeks by abutments, piers and embankments erected by appellant in bridging the streams, the structures admittedly being of a permanent character, and not negligently constructed, it was properly held by the trial court that the case was one in which but a single recovery could be had; the measure of damages being the difference in the vendible value of the real estate just before and immediately after its overflow.
2. Damages—Overflow From Obstruction of Creek—Right of Action for.—Although the bridge abutments, piers and embankments causing the overflow of appellee's lots were erected in 1906, as it was not reasonably apparent to an ordinarily prudent person at the time of their completion, that they would so obstruct the waters of the two creeks as to cause them to overflow the lots, the right of action therefor did not then arise, but accrued after

the overflow of the property in 1909, as it was not until the happening of that event that it became reasonably apparent to a person of ordinary prudence that the structures would cause injury to the property.

3. Damages—Injury to Real Estate.—A party is not required to sue for damages to his real estate resulting from a permanent structure, until it becomes reasonably apparent that he has suffered such damages.

SHELBY & SHELBY, LEWIS APPERSON, R. L. NORTHCUTT  
and H. C. GUDGELL for appellant.

C. W. GOODPASTER, JNO. A. DOUGHERTY for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This action was brought by the appellee against the appellant to recover damages for the flooding of two houses and lots, owned by her, in the village of Salt Lick, caused, as alleged, by the acts of appellant in erecting concrete abutments and piers to support its bridges over Salt Lick and Mud Lick Creeks, and embankments approaching same, whereby the waters of the creeks were so obstructed and diverted from their natural channel and flow, as to make them back upon and overflow the property in question to its great injury. The trial resulted in a verdict awarding appellee \$400 damages; and from the judgment entered thereon this appeal is prosecuted. The village of Salt Lick is situated in the Licking Valley, Bath County, not far from the Licking River which lies a mile or two north of it. Appellant's railroad runs through the valley and village crossing both Mud Lick and Salt Lick creeks before reaching the village; both streams being tributaries of the Licking River. Its bridge over Mud Lick is three quarters of a mile from appellee's property and the bridge over Salt Lick a half mile therefrom. In addition to these streams, there are two smaller streams near or in the village, known as Hog Branch and Dickerson's Branch. Prior to 1906, appellant's trains crossed Mud Lick and Salt Lick creeks upon trestles; in that year, however, iron or steel bridges were substituted for the trestles and these bridges had to be supported by concrete abutments and piers, which were erected on either side of and in the streams; and, in addition, fills were constructed at the ends of each of the bridges. The valley being low, the village, by reason of its situation in the angle formed by the two creeks, is

at times subject, in part, to overflow from the waters of those two streams, such overflows, however, were never known to reach appellee's property until the year 1909; but in February and again in April of that year, both lots were so covered by the high water from the creeks that it entered the houses thereon to a depth of eighteen or twenty inches, each time remaining therein several days. It was alleged in the petition that these inundations of appellee's property resulted from the obstruction and diversion of the waters of Mud Lick and Salt Lick creeks by the abutments, piers and embankments constructed by appellant in bridging these streams, which as to Mud Lick Creek reduced the space or water way from its former width of sixty feet to a narrower width of twenty-five feet; and as to Salt Lick, from its former width of two hundred feet to the narrower width of sixty-five feet, thereby so obstructing and preventing the flow of the waters of each creek as to cause them to back upon and overflow appellee's premises.

The answer of appellant simply traversed the averments of the petition. Appellee, by an amended petition, alleged in substance that at the time of the construction of the bridges, abutments, piers and embankments by appellant, it was not apparent to her or to any person of ordinary prudence residing in Salt Lick, that same would obstruct or divert the waters of the creeks and that this did not become apparent until the flood of 1909, nor could she before that time, by the exercise of the highest degree of care, have ascertained that the abutments, piers and embankments would obstruct or divert the waters of the creeks and cause them to overflow her premises.

It was also alleged in the amended petition that the floods of February and April, 1909 were caused by such rainfalls as might reasonably have been expected by appellant at the time of erecting the abutments, piers and embankments in question, and that similar rainfalls had frequently occurred before the erection of the abutments, piers and embankments.

Appellant by answer specifically denied the allegations of this amended petition; and the affirmative matter of a second amended petition making more definite certain allegations contained in the original and first amended petitions, it controverted by an order entered of record.

Without discussing in detail the evidence, it is sufficient to say that that introduced in appellee's behalf con-

duced to prove that no rainfall previous to the erection by appellant of the abutments, piers and embankments appurtenant to its bridges or indeed, previous to that of February, 1909, had ever caused the waters of the creeks to back upon and overflow her lots. Numerous witnesses testified that the erection of the abutments, piers and embankments appurtenant to the bridges on Mud Lick and Salt Lick creeks reduced the width of the waterway under each bridge to such an extent as to obstruct its flow. Some of the witnesses say at the Mud Lick Bridge the reduction was from a width of 60 to 25 feet and at the Salt Lick Bridge from 200 to 65 feet. Other witnesses do not make the reduction so great, but substantially all of them agree that it was sufficient, following heavy rains, to obstruct or divert the flow of the waters, of the creeks, and that it did so obstruct and cause them to back upon and overflow appellee's lots.

Several of these witnesses, among them McGrew, Shrout, Burnes, Green and North, testified that the rains of February and April, 1909, were not heavier than others they had known to occur at Salt Lick in previous years. According to the further statements of these witnesses, all of these similar previous rains occurred before the erection of appellant's bridges on Mud Lick and Salt Lick creeks, yet none of them caused the waters of the creek to overflow appellee's lots. Appellee's evidence also abundantly established the difference in the vendible or market value of her property before and after its overflow and that the depreciation in its value was and is greater in amount than fixed by the verdict.

On the other hand appellant's evidence conducted to show that the space for the passage of water was not less than 50 feet at Mud Lick Creek and not less than 80 feet at Salt Lick Creek; and that the space for the passage of water at each of the bridges is as great as before the bridges were constructed. This evidence was mainly furnished by expert witnesses, who professed to have reached their conclusions by measurements and calculations, and these witnesses also testified that the inundation of appellee's lots could not have resulted from any obstruction of the waters of the creeks at the bridges, but was caused by an unusual or extraordinary rainfall, and the overflowing of the waters of Hog and Dickerson branches.

Appellant's principle contentions are, that the verdict was flagrantly against the evidence; and that the trial

court erred in refusing to peremptorily direct a verdict for it, as requested at the conclusion of the evidence. It is patent from what we have said of the evidence that the first contention cannot be sustained. While the evidence was conflicting it was the province of the jury to give the greater weight to that of appellee's witnesses, and as this was evidently done by them the verdict cannot be disturbed on the ground that it was unauthorized by or was flagrantly against the evidence.

The complaint as to the court's refusal of the peremptory instruction rests upon two theories; first, that there was no evidence to support the verdict; second, that the petition as amended fails to state a cause of action. The first theory we have already disposed of in holding that the verdict is not flagrantly against the evidence. It is, however, insisted upon the second theory that as the abutments, piers and embankments, alleged to have caused the depreciation in the vendible value of appellee's property, are permanent structures and but one recovery can be had, the cause of action for the damages, if any, sustained by appellee, accrued upon their completion; the measure of recovery being the difference between the vendible or fair market value of the property just before it was known the structures would be made and such value immediately after they were completed; and that as the petition as amended does not in precise terms allege that the value of the property was at that particular time depreciated, appellee has no cause of action. It is true the case is one in which a single recovery must suffice, for the petition, as amended, alleges that the structures which caused the depreciation in value of appellee's property were and are permanent, and the pleadings as a whole showed it to be the purpose of both appellee and appellant to so treat them. Yet it is likewise true, and so alleged in the petition and amendments and shown by the appellee's evidence, that the fact that the erection of these structures depreciated the vendible value of her property could not by reasonable diligence have been known to her until the property was inundated by the flood of February, 1909, therefore, the right of action then accrued. In *M., H. & E. R. R. Co. v. Thomas, &c.*, 148 Ky., 131, quoting from *M., H. & E. R. R. Co. v. Graham*, 147 Ky., 604, we in the opinion, said:

"In *L. & N. R. R. Co. v. Orr*, 91 Ky., 109, *Hay v. City of Lexington*, 114 Ky., 669, *Richmond v. Gentry*, 126 Ky., 319, and many similar cases, it was held that the struc-

ture being permanent and properly constructed a recovery once for all must be had. On the other hand in *City of Louisville v. Coleman*, 22 Ky. L. R., 64, *Klosterman v. C. & O. Ry. Co.*, 22 R., 192, *Finley v. Williamsburg*, 24 R., 1338, and in a number of subsequent cases, it was held that recurring recoveries might be had where the structure was unlawfully or negligently built, and by reason of such unlawful or negligent construction injury was inflicted from time to time. In *L. & N. R. R. Co. v. Cornelius*, 111 Ky., 752, *Childers v. L. & N. R. R. Co.*, 24 R., 275, *Stith v. L. & N. R. R. Co.*, 109 Ky., 158, *L. & N. R. R. Co. v. Clinton*, 109 Ky., 180, *M., H. & E. R. R. Co. v. Thomas*, 140 Ky., 143, and in cases therein cited, it was held that there was a negligent construction of the railroad if the company built a fill and did not leave such openings as were reasonably sufficient for the escape of the water that a person of ordinary prudence should anticipate from the rainfalls and may be reasonably expected to occur. In addition to this there are cases where the trouble cannot be remedied at a reasonable expense; that is, where the cost of remedying it would be so great as to justify the railroad company in condemning the property and taking it under the power of eminent domain. In this character of cases there should be a recovery once for all. In building a railroad the company may do its work so as to deflect a stream from its course, but this may be necessary in the construction of the road. So it may be held that if the trouble may be remedied at a reasonable expense, it may be regarded as temporary; but if the trouble cannot be so remedied it should be regarded as permanent, and this is a question for the jury. (*L. & N. R. R. Co. v. Whitsell*, 125 Ky., 433; *I. C. R. R. Co. v. Haines*, 122 S. W., 211; *L., H. & St. L. Ry. Co. v. Roberts*, 144 Ky., 820). \* \* \* There are also cases in which the parties have both treated the structure as permanent; and where they did this the court also so treated it. (*C. & O. Ry. Co. v. Stein*, 142 Ky., 520; *M., H. & E. R. R. Co. v. Wier*, 144 Ky., 206; *Central Consumers Co. v. Pinkett*, 122 Ky. 720),"

The instant case manifestly belongs to the class of cases in which but one recovery is allowable. In *I. C. R. R. Co., &c. v. Haines*, 122 S. W., 210 (not appearing in Ky. Rep. or Law Rep.), we held that the rule that where an injury to the real estate results from the construction of a permanent structure, the cause of action accrues on the completion of the structure, was not applicable in a case presenting such facts as are here involved. In that case



the structure resulting in the injury complained of was completed more than five years before the institution of the action, but we held that the statute of limitations of five years did not apply, saying in the opinion:

“The assistant civil engineer of the railroad testified that, while the railroad was double tracked in 1900, it was several years thereafter before the creek overflowed the embankment and made a new channel through the Borrow pits. That being the case it is manifest that the facts of this case do not bring it within the rule laid down in that line of opinions holding that where an injury to real estate results from the construction of a permanent structure the cause of action accrues upon the completion of the structure. *L. & N. R. R. Co. v. Orr*, 91 Ky., 109; *Hay v. City of Lexington*, 114 Ky., 665; *Johnson v. O. & N. R. Co.*, 18 R., 276; *Oliver v. I. C. R. R. Co.*, 25 R., 235. In these cases the injury was apparent to a reasonably prudent man at the time of the completion of the structure. In the case at bar the double tracking of the railroad and the digging of the Borrow pits did not cause immediate injury to appellee’s land. His land was not damaged until a few years thereafter when the creek overflowed the embankment and carried the new channel through the Borrow pit. A party is not required to sue for damages to his land until it is reasonably apparent that he has suffered damages. If appellee’s cause of action had accrued in the year 1900 then he might have lost his right of action long before he, as a matter of fact, suffered any damages. The only material damages, if any to his land took place in 1906 and 1907. The action was brought in 1908. It is manifest, therefore, that there was no evidence to justify the giving of an instruction based upon the statute of limitations.”

In the instant case the instruction as to the measure of damages advised the jury in substance in the event they found for appellee, to allow her the difference between the fair vendible value of her lots immediately before it became generally known in that locality that such rainfalls as could reasonably be expected by prudent persons would produce such overflows, if they would produce them, and immediately after such information was generally prevalent in that locality, if it were ever so, not exceeding the amount claimed in the petition.

This instruction, together with the others given in the case, we think fairly presented the law that should have

controlled the jury in arriving at a verdict, and there is no complaint that the verdict is excessive.

Appellant further complains that the court admitted as evidence the mere opinions of witnesses as to the depreciation in value of appellee's lots caused by the structures complained of. It is true some of the evidence in question is open to the objection indicated, but in greater part it went further than mere expressions of opinion, for many of the witnesses fixed the value of the lots both before and after February and April, 1909, and stated other relevant facts upon which it was competent for them to express an opinion as to the damage sustained by appellee on account of the depreciation in the vendible value of the lots, resulting from the erection of the structures complained of.

Our consideration of the record fails to convince us of any error in the trial that can be said to have prejudiced any substantial right of the appellant. Therefore, the judgment is affirmed.

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### **Blalock, et al. v. Atwood.**

(Decided June 13, 1913.)

#### **Appeal from Graves Circuit Court.**

1. **Deeds—Designation of Street—Description—Easements.**—Where a deed conveying a city lot designates the street upon which it fronts as one of the boundaries thereof, it will, in the absence of language showing a contrary intention, be construed as including the sidewalk in front of the lot and the street to the centre or middle thereof, subject to the free use of the sidewalk and street by the public. The fact that the description only brings the lot to the edge of the street can make no difference, for such description must be merely understood as specifying the ground the grantee may hold and use as exclusively his own, and as defining the line at which the public easement begins; the grantee owning subject to that easement, to the center of the street.
2. **Deeds—Boundaries—Easements—Title—Shade Trees.**—As according to the above rule the deed carries the front boundary of the grantee's lot to the center of the street and passes to him the title to the ground included in the sidewalk and street to the center of the street, subject to the public easement, it necessarily passes to him the title to the shade trees that may be standing on the sidewalk in front of the lot, subject to the public easement; and if the sidewalk contain a shade tree which stands

in part in front of his lot and in part in front of the lot of an adjoining owner, each owner will have a property right in so much of such tree as stands on his side of the line dividing the lots.

3. **Trespass—Injury to Trees—Action for Trespass.**—If a tree standing upon the line between adjoining lots is injured or destroyed by one of the owners, without the consent of the other, trespass will lie against the wrongdoer in favor of the joint owner without whose consent the tree was destroyed or injured.
4. **Trespass—Exemplary Damages.**—In such case, if the trespass be wantonly or maliciously committed, exemplary damages, in addition to the actual loss inflicted, may be recovered of the wrongdoer.

HOLIFIELD & GARDNER for appellant.

JOHNSTON & WYMAN and R. Q. HESTER for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment entered upon a verdict of \$275 damages which appellee recovered of appellants in the court below for a trespass committed by the latter. A former appeal in this case was dismissed because of the appellants' failure to file the transcript in the office of the clerk of this court twenty days before the first day of the second term of the court next after the granting of the appeal, as provided by section 738, Civil Code. (*Blalock v. Atwood*, 148 Ky., 828). The present appeal was granted by the clerk of this court.

It appears from the record that the appellant, Blalock, and the appellee, Atwood, own and reside upon adjoining lots situated on Cherry street in the city of Mayfield. The lots were originally included in the one block which belonged to the common grantor of the present owners. Appellee has owned and resided upon his lot thirteen years; the appellant Blalock, has owned and lived upon his lot only two or three years. The action was brought against appellants, L. B. Blalock, Bill Smith and Cal Harris, Smith and Harris being Blalock's employees, to recover damages for the destruction by them of a shade tree, known as a silver leaf poplar, which stood in the sidewalk in front of the lots in question and partly upon each lot. The amount of the damages claimed was \$500. The object of the action and character of the injury alleged are stated in the following excerpt from the petition:

“That on or about said date (August, 1911), the defendants, L. B. Blalock, Bill Smith and Cal Harris, over the repeated and continued protest and objections of the plaintiff, wantonly, willfully, knowingly, unlawfully, forcibly and in a highhanded and oppressive way and manner, without any regard whatever for the rights of this plaintiff, entered upon said lot or land and cut the limbs and body and dug up by the roots and removed and destroyed one very large and very valuable shade tree, which tree stood at least two-thirds, if not entirely on plaintiff's side of the line and was a shade tree, a protection and an ornament to plaintiff's dwelling house and premises.” \* \* \*

The answer of appellants, in effect, admitted the removal and destruction of the tree, but denied the averments as to the manner in which it was done. Also denied that the tree was to any extent on appellee's lot or that he was damaged by its removal, and alleged that appellants possessed the right to remove it. Such of the averments of the answer as were of an affirmative nature, were controverted by appellee's reply. Appellants complain that the verdict is flagrantly against the evidence; that the jury should have been peremptorily instructed to find for appellants; and that the damages awarded were unauthorized by the evidence and so excessive in amount as to indicate that the jury were influenced by passion or prejudice.

In our opinion none of these contentions is sustained by the record. As to the first it is sufficient to say that the weight of the evidence was to the effect that the tree removed by the appellants was in part on the land of the appellee and in part on that of the appellant Blalock; three-fourths of it being on the lot of the former and one-fourth on the lot of the latter. This fact was established, not only by the testimony of witnesses familiar with the line dividing the two lots, but also by a surveyor who ran the lines of the lots. Moreover, it was shown by several of appellee's witnesses that a year or more before the removal of the tree the appellant or his son, who was his immediate grantor, caused the fence between the two lots to be rebuilt, in doing which the new fence was moved six or eight inches further over on appellee's lot by the manner in which the posts were reset, and by wholly placing the perlines and other material of which the fence was constructed on the side of the posts next to appellee's lot, instead of on the side thereof next to the appellant, Bla-

lock's lot, as they were placed on the posts of the old fence.

We do not find that the evidence furnished by the appellants' witnesses conduced to prove that the tree was not in part on appellee's side of the line dividing the two lots. It was more particularly directed toward showing that the present fence stands precisely where the old one stood, and that the tree was not as much as three-fourths of it on appellee's side of the line. We are convinced, that the evidence authorized a verdict for the appellee.

Appellants' contention as to the peremptory instruction rests upon their claim that the tree removed by them was a part of Cherry street and, therefore, appellee had no property right therein. The law gives no support to this contention. Along the east side of Cherry street in front of the lots of appellee and the appellant, Blalock, is a pavement, between the outer edge of which and the street curbing, is a narrow grass plot and on this grass plot the tree removed by the appellants was situated. The third line of appellee's deed calls to run with the line of Blalock's lot from the rear of both lots, 225 feet to Cherry street, thence north and with the east line of Cherry street, 92 feet to the beginning also on Cherry street. Appellee's deed, therefore, carried the front line or boundary of his lot to the center of Cherry street, subject to the use of the entire street and sidewalk by the public; and if the city authorities of Mayfield should discontinue the street and sidewalk, appellee's title to ninety-two feet in width, to the center of the street, of the ground now included in the street and sidewalk could not be questioned.

In *Williams v. Johnson*, 149 Ky., 409, the city of London having by proper authority converted a public road within its limits, upon which the appellants' lots fronted, into a macadamized street and in doing so abandoned the use of part, but at no point more than the whole of the old roadbed in front of the lots, the appellee, their grantor, by actions in ejectment against appellants, severally, sought to recover such part of the old road bed as lay between their lots and the new street, upon the ground that its abandonment as a public highway entitled him to same. We held, however, that as the deeds by which appellee conveyed the lots described them as fronting and abutting on the old road, and the street was substituted for the old road, its construction and establishment by the city operated to include the abandoned roadbed in appel-

lants' lots, respectively, and extend the boundaries thereof to the edge of the street. In the opinion it is said:

"It seems to be the universally recognized rule that the conveyance of land bordering upon a public highway conveys title to the centre of the highway, subject to its use by the public, whether it is so expressed in the deed or not; and where a conveyance, or a bond to convey, designates the public highway (or street) as one of the boundaries of the tract, it will, in the absence of language showing a contrary intention, be construed as including the highway itself to the centre or middle thereof. Tiedman on Real Property (3rd Ed.), section 601; 2nd Washburn (side page), 636; 14 Enc. of Law, 1181; 2 Ballard Law Real Property, section 48; Warbritton v. Demarett, 129 Ind., 346; Silnay v. McCool, 86 Ga., 1; Firmstane v. Splater, 150 Pa., 615; Trustees of Hawesville v. Landis, 8 Bush, 679; Snider v. Jacob, Etc., 86 Ky., 106; Jacob v. Washfork, 90 Ky., 429; Bright v. Farmer, 20 R., 772; Hommell v. Lewis, 23 R., 2299; Coppin v. Madson, 144 Ky., 634; Ballard, &c. v. City of Louisville, 3rd Ky., Opinion 31."

In Snider, &c. v. Jacob, &c., supra, we held that where the owner of land adjacent to a city exhibits a map of it, laying it out into building lots, streets and alleys, and sells the lots as bounded by such streets or alleys, this is an immediate dedication of the streets and alleys to the use of the purchaser and to the public, although they have not been actually opened; and where a lot thus sold fronts on a street, and the deed calls for the street as the boundary, the title passes to the center of the street, subject to the right of the public to the use; and if the street is never opened the purchaser is entitled to hold to the center of the strip of ground thus described as a street.

The reasons for the rule in question are thus given in the opinion:

"The purchaser of the lot, doubtless, would not have purchased it but for the usual benefits of the street; he therefore pays an increased price for the lot. He purchases the lot with the understanding that he may build houses fronting on the street, with windows, doors and door posts, and that the door steps may extend beyond the line of the street; also, that he may construct vaults below the surface of the street; and vaults in cities of considerable size are nearly always constructed under the sidewalk, and they are sometimes extended to the center of the streets. Their construction as depositories for

fuel and other necessities is highly necessary. Shade trees, posts, awnings, etc., are also necessary protections and conveniences. If the grantor held the property right in the street up to the dividing line between the street and the lot, he could deprive his vendee of the right of ingress from the street into his house, and exit from it, of light and air, and of planting shade trees and erecting posts and awnings, and of constructing vaults. \* \* \* For these reasons the correct rule seems to be that where a lot fronts on a street, and the deed calls for the street as the boundary, the title passes to the center of the street subject to the right of public use. \* \* \* The fact that the description only brings the lot to the edge of the street can make no difference, for the description which thus brings the lot to the edge of the street must be merely understood as specifying the land that the purchaser may hold and use as exclusively his own, and as defining the line at which the public easement begins; the purchaser owns, subject to that easement, to the center of the street. (Paul v. Carver, 26 Pa. St. R., 223)."

If, as the above authorities hold, appellee's deed calling as it does, to run with the east side of Cherry street, carries the front boundary of his lot to the center of the street and conveys him the title to the ground included in the street to the center thereof, subject to the public easement, it necessarily also passed to him the title to the entire sidewalk in front of his lot, subject to the public easement; and if the shade tree removed by appellants from the sidewalk was in part on his side of the line dividing his lot from the lot of the appellant, Blalock, his title to such part of the tree can not be questioned. This being true, the appellants, notwithstanding the fact that the tree was also in part on Blalock's side of the division line, had no right to remove the tree without appellee's consent, and in doing so they committed a trespass.

In Griffin v. Bixby, 37 Am. Dec., 225, it was held that:

"A tree standing directly upon the line between adjoining owners so that the line passes through it is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other."

The fact that the shade tree in question stood on the border of the sidewalk, where it afforded shade for the benefit of those who traveled the sidewalk, did not interfere with the appellee's right to protect it from destruction, or with his right to recover damages for the injury

done his property right therein by the act of appellants in destroying it. *Musch v. Burkhart*, 12 L. R. A., 486. In *Russellville Home Tel. Co. v. Commonwealth*, 33 R., 132, we held that it was an indictable offense under the statute for the telephone company to unnecessarily cut shade trees standing on the side of a highway on the land of one who had given it permission to erect its line and poles thereon, saying in the opinion:

“They stood upon Orndorff’s land on the border of a public highway, and trees upon the highway are valuable for the shade they make for the benefit of those who travel the highway; and the owner’s right to protect them from the ax was not lessened by the fact that other persons using the highway in common with him, got the same enjoyment he received from the shade afforded by the trees when standing.”

Having, as we think, properly disposed of the first and second grounds urged by appellants for a reversal, we will now consider the third and final complaint, that the verdict is excessive. We regard the complaint as without merit. According to the evidence the tree was twenty-four inches in diameter, symmetrical in form, free from disease or blemish, and of sufficient size and height to afford excellent shade and at the same time greatly ornament appellee’s premises. The value of such a tree is very great and we are not surprised that the witnesses introduced in appellee’s behalf so regarded it. Several of them testified that its loss to appellee greatly reduced the vendible value of his property. Some of them saying in substance that its fair market value, whether sold for cash or on reasonable credit, was less by \$250 or \$300, after the destruction of the tree than was its value before, and others placed the difference or deterioration in the value of the property at a larger sum and one or more of them as high as \$500. But in addition to the actual damage to appellee’s property by the destruction of the tree, the wanton and malicious character of the trespass committed by appellants in destroying the tree authorized the jury to award appellee exemplary damages. The conversation had with the appellant, Blalock, by appellee and his responses to the requests to spare the tree made of him by the latter, illustrate the animus, wantonness and violence with which the trespass was committed. The testimony of appellee as to the conversation referred to was corroborated by others and much of it undenied by the appellant, Blalock.



Manifestly, under the averments of the petition, and the evidence, the case was one for the recovery of exemplary as well as actual damages, and we have been unable to find in the record any cause for holding that the \$275 damages awarded by the jury is in any sense excessive; nor is it apparent that anything occurred during the trial to inflame the passions or excite the prejudices of the jury toward the appellants.

The instructions gave the jury, in substantially correct terms, all the law required for their guidance in arriving at a verdict, and no material error is shown in the admission or rejection of evidence.

The conclusion we have reached makes it unnecessary for us to pass upon appellee's motion to strike the bill of exceptions from the record.

Judgment affirmed.

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### Marcum's Admr., et al. v. Marcum.

(Decided June 17, 1913.)

#### Appeal from Clay Circuit Court.

1. Partnership—Creation—Evidence.—In an action for the settlement and accounting of a partnership between the surviving partner and the estate of his deceased partner evidence held to establish the existence of a partnership in each of two enterprises.
2. Partnership—Interests—Evidence—Presumption.—In the absence of evidence showing the interest of partners in a joint enterprise, all partners will be presumed to have equal interests.
3. Partnership—Witnesses—Competency—Books of Accounts.—In an action for an accounting and settlement of a partnership, the surviving partner in possession of the firm's books of accounts is a competent witness to their authenticity. He may not, however, explain or testify as to entries made therein, unless the books were kept, and the entries made, by him.
4. Partnership—Witnesses—Competency—Checks.—In an action for an accounting and settlement of a partnership, the surviving partner is incompetent to testify as to transactions evidenced by checks issued by the deceased partner on the firm's bank account, as being an act done or omitted to be done by a deceased person.
5. Partnership—Accounting—Evidence—Burden of Proof.—In an action for an accounting and settlement of a partnership, where a partner kept the books of account of the firm and the books contained no entry or explanation of checks issued by him upon the firm's bank account, such checks will be presumed to be an appropriation of the partnership assets for the individual benefit

of such partner, and the burden is upon him or his representatives to show the application of such funds to joint benefit.

- 6 Usury—Right to Plead.—The right to plead usury is personal, and the borrower may renounce the benefit of the usury statutes if he chooses and refuse to avail himself of their protection.
- 7 Partnership—Accounting—Usury.—In an action for an accounting and settlement of a partnership, the surviving partner should be credited with usury paid by him as a part of the partnership expense, if at the time he contracted to and did pay the usury, he, in so doing, acted in the utmost good faith toward the other partner. Such claims are not within the contemplation of section 3870, Ky. Stats., which requires claims against the estates of deceased persons to be purged of usury before suit.
8. Partnership—Actions For Accounting—Equity—Judgment.—In an action for an accounting and settlement of partnership affairs, the correct practice is, where a dissolution of a partnership exists or is decreed, to direct a sale of all the firm assets of whatever nature, unless a lawful agreement to distribute them in specie is assented to by the parties; and if, because of litigation with third parties over claims or rights growing out of the partnership, or for other valid reasons, disposition of every material issue involved must be deferred, such partial distribution of the cash on hand as would be justified by the record should be ordered; and thereafter, when the rights of all parties can be adjusted, final judgment should be entered.
9. Appeal—Harmless Error.—A judgment against a deceased partner for contribution before all assets of the partnership were converted into cash, is not prejudicial where it is reasonably certain from the record that such assets have little value and the case is retained on the docket for a further accounting.

A. T. W. MANNING, T. L. EDELEN for appellants.

H. C. FAULKNER and RAWLINGS & WRIGHT for appellee.

#### OPINION OF THE COURT BY JUDGE LASSING—Affirming.

In the spring of 1906, H. B. Marcum and his son, Hiram R. Marcum, formed a partnership under the firm name of "H. B. Marcum & Son," with equal interests therein, and shortly thereafter operated a country store at Benge, in Clay County, Kentucky. The firm also engaged in logging on Red Bird Creek in that county. The store was under the personal management of the son; the logging business, under that of the father. During the existence of the partnership, they acquired three tracts of land in Clay County. The son also engaged in farming and trading on his own account. He kept no individual bank account, and to meet his personal requirements as to money checked on the firm's account in bank.

As to some of these items, he failed to make entries on the books of the partnership.

In October, 1908, Hiram S. Marcum died intestate, survived by his partner, his widow, and five infant children. His partner and William McWhorter were appointed and qualified as his administrators. The surviving partner took possession of the firm's assets and proceeded to liquidate the partnership estate. In 1909 he brought suit against his co-administrator and the real representatives of the decedent in which he sought a settlement of the partnership and a sale of the lands. The guardian *ad litem*, appointed for the infant children of the decedent, answered charging that plaintiff, in the liquidation of the firm's affairs, had been negligent and permitted the estate to depreciate. A reference to the master commissioner was neither asked of nor required by the court, but a marshaling of the assets and liabilities was undertaken to be made by means of exhibits filed with depositions taken in the case. After most of the proof had been taken, McWhorter, the administrator answered denying the insolvency of the partnership estate, alleging certain items mentioned in the proof were not properly chargeable to the estate of decedent. This answer was traversed by a reply. The real estate was sold while the case was being prepared for trial. Upon final submission, the chancellor entered his finding that the partnership existed, embraced the stock of goods, the logging contract, and the lands referred to in the pleadings; that the surviving partner paid individually \$2,191.46 in discharge of the partnership obligations in excess of its assets that came to his hands; and that the deceased partner withdrew from the firm various sums of money aggregating \$2,068.21, which he omitted to charge to himself and with which he was not charged on the books of the partnership. In accordance with said finding, he rendered judgment against the estate of the deceased partner in favor of plaintiff for \$2,129.94, one-half the total of said two sums. The court made an additional finding as follows: "There is yet some outstanding indebtedness coming to said partnership and there is some litigation yet unsettled between this plaintiff and one Frank Hacker growing out of the logging job above mentioned and a complete settlement cannot be had of this partnership at this time, by reason of the facts above set forth, and the plaintiff will have to make a further accounting and settlement herein upon said unfinished business." The

defendants being dissatisfied with said finding as to the indebtedness of the deceased partner to the firm and with said judgment appeal.

Reversal is here sought upon three grounds: First, error of the court in rendering judgment against the estate of the deceased partner before liquidation of the partnership affairs; second, because the court failed to purge of usury claims against the partnership paid by appellee; and third, error of the court in permitting appellee to testify for himself as to verbal transactions between him and decedent which make up his cause of action against the estate of the decedent.

The errors complained of will be considered in their inverse order.

Complaint is made that appellee was permitted, over the objection of appellants, to testify as to the existence of the partnership between him and his deceased son, and also as to the items going to make up the claim of \$2,060.21 found by the court to be owing by Hiram R. Marcum to the partnership.

The partnership agreement between appellee and his son was verbal, and appellee was unquestionably incompetent to testify concerning this matter. It is not seriously contended that the store referred to was not a partnership enterprise, but it is earnestly insisted that there was no competent evidence to establish the partnership in the logging contract. James F. Marcum, a competent witness, testified that he sold, making the trade with Hiram R. Marcum, and was given a firm check for some land from which timber was taken in the logging operations in question. E. G. Garrard, another competent witness, testified that the decedent admitted to him that he was a partner with his father in this logging contract. No contrary evidence was introduced, or attempted to be introduced, to overcome the facts established by this testimony. While the interest of each partner is not established by competent testimony, in the absence of such evidence each partner will be presumed to have an equal interest. The evidence, while not overwhelming, clearly establishes that appellee and his son were partners in the store and logging enterprise, and that their interests were equal.

We will next consider the item of \$2,060.21, in support of which appellee introduced books of account of the firm and certain checks drawn by the deceased partner on the firm's bank account. The surviving partner

was lawfully entitled to, and was in, the possession of the firm's books of accounts and was a competent witness to their authenticity. To this extent, his testimony was not concerning any verbal statement, or any transaction with, or any act done or omitted to be done by the decedent, and was not inhibited by section 606, sub-section 2, of the Civil Code. He may not, however, explain or testify as to entries actually made therein, unless the books were kept and the entries made by him. Aside from this, it would have been the duty of the court to compel the production of these books for examination by the parties interested, in order that they might be advised as to the condition of the partnership affairs, in so far as it could be ascertained from the books. No just ground of complaint is afforded appellants because of the introduction of these books.

The books show that Hiram B. Marcum was indebted to the firm \$201.28 in excess of the amount owing by the surviving partner. No objection is made to this item. But objection is made to the introduction and consideration of various firm checks aggregating \$1,931. They were introduced and made exhibits with the deposition of appellee. He was clearly incompetent to testify as to any transactions, of which these checks were evidence. Other witnesses, wholly competent, identified these checks as being in the handwriting of the deceased partner. They evidenced an appropriation of a part of the firm's assets. Some, on their face, showed an application of partnership assets to the individual benefits of the deceased partner. Evidence by competent witnesses shows a like application of the amounts represented by the other checks. The books contain no entry or explanation of any of the transactions involved in the issuing of these checks. It is in evidence that the books were kept by the deceased partner alone, and the store was under his exclusive management. The checks were drawn by him. Under this state of case, the burden was upon the representatives of the deceased partner to show the application by him of the firm's assets, of which these checks were an appropriation. In 30 Cyc., 742, the rule is thus stated:

"If a party fails to perform his duty of keeping accurate account of partnership affairs, all doubts respecting particular items will be resolved against him, unless there is some reason for not applying the rule, and in

such case the court will resort to the best evidence obtainable to ascertain the true state of the account."

Again, Bates, in his work on the Law of Partnership (Vol. 1, Sec. 313), quoted with approval in *Thomas v. Winchester Bank*, 105 Ky., 694, said:

"And if one partner has the duty of keeping the books, and does not do so properly, every presumption will be against him; he may be charged with interest, if no account of profit can be given; he will be charged with sums coming into his hands, unless their application to joint benefit is most satisfactorily proved."

The burden being upon appellants, and they having failed, to show the application of the sums represented by these checks, which, together with the uncontested item of \$201.28, amount to \$64 more than the finding of the chancellor on the item of liability of the deceased partner to the firm, they have no just ground of complaint as to this matter.

It is also contended that the item of \$2,191.46, paid by appellee for the benefit of the partnership, should have been purged of the usury therein. The usury complained of is \$120 paid on the Ed. Hogg note—just what amount of this was paid before the dissolution of the partnership the record does not show—and the further sum of \$122.07 paid in excess of the legal rate of interest on the John A. Black note after the death of the partner.

The right to plead usury is personal. Usury statutes are made for the benefit of the necessitous borrower, who may renounce their benefit if he chooses, or refuse to avail himself of their protection. *Campbell v. Johnson*, 4 Dana, 177. Appellee and his son were engaged in an enterprise for their common benefit. The borrowing of money to carry on their business was prohibited neither by their partnership agreement nor by law. The payment of interest is a proper expense to be charged against the partnership. If paid by one partner, he is entitled to be reimbursed out of the firm assets, in default of which the other partner is liable to him for such proportion thereof as the interest of such partner may be. There is no showing that the firm, considering their financial resources and standing, the hazardous nature of the business in which they were engaged, and the condition of the money market at the time the loans were made, could have procured upon the security offered loans at less than ten per cent and eight per cent respectively. The burden was upon appellants to show

this. In partnership dealings, each partner is under the duty of acting with the utmost good faith toward the other. There is nothing in agreeing to pay and in paying usury inconsistent with that fidelity of conduct exacted of a partner. The payment of usury before the death of the partner was, so far as the record shows, entirely consistent with the soundest business policy and good morals, and the court should not, under such circumstances, compel appellee to exercise, on behalf of the partnership, a right which he is free to avail himself of or to reject. He had a discretion in the payment or refusal of payment of the usury, and he is not shown to have abused that discretion.

After the death of his partner, appellee was under no higher degree of fidelity in the liquidation, than he was in the transaction of the business of the partnership, during its existence. The death of the partner, in no wise, changed the conditions under which the money was borrowed and the usurious rate of interest promised. If payment of usury before the death of his partner did not amount to a breach of good faith, payment of usury upon partnership engagements entered into during the existence of the partnership cannot be a breach of duty. This is an action for an accounting and settlement of partnership affairs. The question at issue is not one of borrower and lender, but one of mutual accounts. The allowance or rejection of payments of usury as a legitimate expense of the partnership is to be determined not by the ultimate consequences to the partnership estate but by the good faith of the partner in making such payments. The claim here presented is not within the contemplation of section 3870, Kentucky Statutes. If it were, the claimant would have had to purge his demand of all usury before suit. The claim not being of that character, appellee was justified in the payment, after the death of his partner, of the usury agreed to be paid during the existence of the partnership.

Lastly, it is insisted that the court erred in entering judgment in favor of the surviving partner against the estate of the deceased partner before the partnership assets were converted into cash. The correct practice is, where a dissolution of a partnership exists or is decreed, to direct a sale of all the firm assets of whatever nature, unless a lawful agreement to distribute them in specie is assented to by the parties; and, if, because of litigation with third parties over claims or rights growing out of

the partnership, or for other valid reasons, a postponement of disposition of every material issue involved in the action becomes necessary, such partial distribution of the cash on hand as would be justified by the record should be ordered; and thereafter when the rights of all parties can be adjusted, enter final judgment. In the case at bar, it is in evidence that the firm assets, not realized upon at the time of the judgment, were practically worthless. They consisted largely of notes and accounts. Those liable were practically insolvent. Limitation had run against many of the accounts. Suits were instituted, and in some cases a plea of payment was successfully maintained, in others judgments were obtained and executions issued and returned, "no property found." The cause was retained on the docket to await the issue of litigation growing out of the logging contract and of further attempts to collect the notes and accounts. It appears that there is little hope of recovery of any substantial amount from any source for the benefit of the partnership. Such being the case, the substantial rights of appellants have not been prejudiced, and we would not be warranted in reversing the judgment for the error complained of.

Perceiving no error in the record prejudicial to the rights of appellants, the judgment is affirmed.

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### **Polsgrove, Mayor, et al. v. Moss.**

(Decided June 17, 1913.)

#### **Appeal from Franklin Circuit Court.**

1. Nuisance—Police Regulations to Protect Health of Public—Unsanitary Dwellings—Proceeding in Police Court to Remedy Nuisance—Notice.—Under statutory authority to make all police regulations to secure and protect the health and safety of the public, and to define and suppress nuisances, the city may by ordinance provide that houses intended for dwelling purposes which are so unsanitary or out of repair as to be unfit for habitation or unsafe for occupation or dangerous to the public or injurious to the health or morals of the community, shall not be rented or leased, and to provide that the owner may be fined in a proceeding in the police court if he fails to remedy the nuisance within twenty days after notice so to do.
2. Nuisance—Ordinance Providing for Judicial Proceeding to Suppress.—A city ordinance providing for a judicial proceeding in a



police court for the suppression of nuisances must be read in connection with the common-law rules governing judicial proceedings and will be construed as requiring the nuisance to be abated, not the structure to be removed, unless this is necessary to remedy the trouble.

3. Nuisance—Judgment of Police Court Abatement—Appeal.—From a judgment of the police court abating a nuisance, an appeal will lie to the circuit court although the fine is less than \$25.
4. Ordinances—No Provision in Act Governing Third Class Cities to Test Validity of—When Injunction to Restrain Enforcement Will Not Be Granted.—There being in the act governing cities of the third class no provision for testing the validity of an ordinance by suit in the circuit court, and no ground for equitable interference being shown by the petition, an injunction restraining the enforcement of the city ordinance will not be granted.

JAMES H. POLSGROVE for appellant.

SCOTT & HAMILTON for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Reversing.

The act for the government of cities of the third class, including the city of Frankfort, provides:

“The common council of each of said cities shall, within the limitations of the Constitution of the State and this act, have power by ordinance. \* \* \*

“To make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public; and to define, declare, prevent, suppress and remove nuisances either within the city or within one mile thereof. \* \* \*

“To impose penalties upon the owners, occupant or agent of any house, wall, sidewalk, or other structure which may be considered dangerous or detrimental to the public, unless after due notice, to be fixed by ordinance, same to be removed or repaired; and to remove or repair same at owner's expense when suffered to remain contrary to ordinance.” (Sec. 3290, Ky. Stat., subsection 16, 26).

Under the power thus conferred the common council of the city of Frankfort enacted the following ordinance:

“An ordinance to prohibit the maintaining, use, occupancy or letting of dwellings which are so unsanitary or out of repair as to be dangerous or unhealthy, and providing for the abatement thereof.

“Be it ordained by the common council of the city of Frankfort:

"Sec. 1. That no building, house or room, intended or designed for dwelling purposes, which is or may hereafter become, so unsanitary or out of repair as to render it unfit for habitation, or which is or may become unsafe for occupancy, or that may be considered dangerous or detrimental to the public, or injurious to the health or morals of the community, shall be rented, leased, let, hired out or permitted to be used, either with or without compensation.

"Sec. 2. That no building, house or room, intended or designed for dwelling purposes, which is or may become so unsanitary or out of repair as to render it unfit for habitation, or which is or may become unsafe for occupancy, or may be considered dangerous or detrimental to the public, or injurious to the health or morals of the community, shall be maintained or occupied.

"Sec. 3. Whenever any building, house or room, intended or designed for dwelling purposes, shall be unfit for habitation for any of the causes named in sections one and two of this ordinance, the occupant or occupants thereof shall vacate within ten days, and the owner or owners shall abate and remove the same within twenty days after receiving from the Mayor notice or notices so to do which notice or notices shall set forth the grounds therefor.

"Sec. 4. Upon complaint in writing made to him by the Health Officer of the city, or by petition filed with him, signed by three or more persons, owners of real estate residing in the city shall cause to be served, by the chief of police, in writing upon the occupants and owners of any such premises, the notice or notices provided for by section three, to be served by delivering or offering to deliver a copy to the person to whom it is directed, or if such person cannot be found, by delivering a copy to his agent, or by affixing such copy to the front door of the premises sought to be abated.

"Sec. 5. Upon the failure of the owner or owners to abate and remove any such building, house or room within the time required by section three, he or they shall be subject to a fine of not less than five nor more than twenty dollars, and ten dollars for each succeeding twenty-four hours it remains unabated, and it shall be the duty of the Mayor, at the expiration of said twenty days, to cause a warrant or summons against such owner or owners to be issued by the police judge, charging a violation of this ordinance, and if upon a trial of the

charge the party against whom the said warrant or summons was issued, shall be convicted, the judgment of conviction shall order the abatement and removal of the building, house or room designed in said warrant. Provided, that if the owner be a non-resident of the State or county of Franklin, he shall be proceeded against by warning order, as prescribed by the Civil Code of the State in proceedings against non-residents, and the fine fixed by this section shall not be imposed and the judgment of the court shall only require the abatement and removal of the structure so designated.

"Sec. 6. Whenever there shall be a conviction under the preceding section, it shall be the duty of the Mayor, in the name of the city, to contract with some suitable person or persons to abate and remove the structure designated in the warrant or summons upon which said conviction was had, at the cost of the owner or owners thereof, which cost, if not paid by the owner or owners, may be paid by the city, and the amount so expended shall be recovered by the city by suit in any court of competent jurisdiction.

"Sec. 7. Any tenant or occupant, not the owner of the premises, who shall violate section three shall be fined not less than two nor more than ten dollars, and each twenty-four hours after ten days notice, as required therein, shall constitute a separate offense.

"Sec. 8. All ordinances or parts of ordinances in conflict herewith are hereby repealed, and this ordinance shall take effect and be in force from and after its passage and approval by the Mayor."

After the ordinance had taken effect, the health officer of the city made complaint in writing to the Mayor that a certain house owned by Dulin Moss and intended for dwelling purposes was so unsanitary and out of repair as to render it unfit for habitation, unsafe for occupancy and dangerous to the health and morals of the community. The Mayor gave notice to Moss as provided in the ordinance notifying him within twenty days after receiving the notice to vacate, abate or remove the building. Moss thereupon brought this suit against the Mayor, the health officer and common council of the city, alleging that the city was without authority to pass the ordinance; that it was void; that to enforce the ordinance would deprive him of his property without due process of law, and deny him the equal protection of the laws; and that unless enjoined the defendants would at once

proceed to enforce the ordinance, destroy his property without compensation therefor, and proceed to fine him in the police court, all of which would produce great and irreparable injury to him. On a hearing of the case before the circuit court a permanent injunction was granted restraining the defendants and each of them from in any way interfering with the property or from proceeding by warrant or otherwise in the police court or in any other court, against the plaintiff for violation of the ordinance referred to; to all of which the defendants excepted and prayed an appeal to this court which was granted.

It is insisted for the plaintiff that the ordinance gives the authorities of the city of Frankfort the power absolutely to destroy and tear down houses intended alone for dwelling purposes; that whenever in the opinion of the proper authorities the house comes within section 1, it shall be the duty of the persons living in it to vacate within ten days, and the owner of the house shall be required to abate or remove it within twenty days. It is earnestly insisted that nothing in the statute was intended to confer such power, and that such power cannot be conferred under the Constitution.

In determining the proper construction of the ordinance the court should read it in connection with the statute under which it was enacted; for the language of the ordinance is largely borrowed from the statute and it is to be presumed that the city authorities were endeavoring simply to follow the statute. Under the act of the Legislature, the common council of the city is given power to make all police regulations to secure and protect the general health, comfort, convenience, morals and safety of the public, and to define, suppress and remove nuisances, to impose penalties upon the owner or occupant of any house or other structure dangerous or detrimental to the public unless after due notice to be fixed by ordinance, the same be removed or repaired, and to remove or repair the same at the owner's expense, when suffered to remain contrary to the ordinance. Pursuant to the statute, section 1 of the ordinance provides that no house or room intended for dwelling purposes which is so unsanitary or out of repair as to render it unfit for habitation or unsafe for occupancy or dangerous or detrimental to the public, or injurious to the health or morals of the community, shall be rented or be permitted to be used, either with or without compensation. In this

section the city did not exceed the power conferred upon it by the statute. Whether the house is unfit for habitation, unsafe for occupancy or dangerous or detrimental to the public or injurious to the health or morals of the community, is a question to be determined under the facts of each particular case, and the house does not violate the section unless the circumstances existing are sufficient to establish the fact that it is so unsanitary or out of repair as to render it unfit for habitation, or that it is unsafe for occupation or dangerous or detrimental to the public or injurious to the health or morals of the community. The words "may be considered" are taken from the statute, the word "considered" being used in its old sense, and in equivalent to "reasonably regarded."

The second section is practically the same as the first except that it applies to the occupants of the house. The third section was evidently drawn to conform to that part of the statute which requires due notice to be fixed by ordinance before penalties may be imposed. Under this section the occupant has ten days to vacate the premises and the owner twenty days to remove or abate the nuisance after the notice is given. In arriving at the meaning of this section we must look not only at its words but the ordinance as a whole and the purpose intended to be accomplished. The ordinance is enacted under the police power to define, suppress and remove nuisances. It is aimed at dwelling places which are so unsanitary or out of repair as to be unfit for habitation or unsafe for occupancy or dangerous or detrimental to the public or injurious to the health or morals of the community. While in section 3, the words used are "the owner or owners shall abate or remove the same" the meaning is not that he is to remove the building, house or room, but that he is to remove the nuisance. If the house is so unsanitary as to render it unfit for habitation, he must put it in a sanitary condition if practicable. If it is so out of repair as to render it unfit for habitation, he must if this is practicable repair it and make it fit for habitation, or if it is unsafe for occupancy or dangerous or detrimental to the public or injurious to the health or morals of the community, he must remove the cause of the trouble. The object of the ordinance is to secure the removal of the nuisance, and when the nuisance is removed the ordinance is not violated. The dwelling itself is not required to be removed unless this is the only

practicable way to remove the nuisance. The removal of the nuisance, not the removal of the structure is the thing aimed at. The ordinance as a whole contemplates an abatement of the nuisance to be enforced by a judicial proceeding in the police court. The common law is in force in this State; all our courts are governed by it in administering justice; the police court in trying these cases will be guided by the common law in entering judgment. At common law in exercising their power to abate nuisances, the courts do not destroy property if it is practicable otherwise to remove the nuisance. Property may be destroyed if this is necessary to remove the nuisance. The general laws of the State governing all courts of justice must be borne in mind in construing the ordinance; for the judicial proceeding contemplated by it must be conducted according to these principles. If the structure is so out of repair or so unsanitary as to be unfit for habitation, or is dangerous to the public, and the trouble cannot be remedied at a reasonable cost considering the value of the structure when improved, the court may order it removed or he may in his discretion allow the owner to elect which course he will pursue where the matter is doubtful. In the exercise of the police power by the city, property which is a menace to public safety or health, may be destroyed without compensation when this is necessary to protect the public, but the public necessity is the limit of the right. *First Nat. Bank v. Sarlis* (Ind.), 28 Am. St. Rep., 185; *Mayor v. Mulligan*, 51 Am. St. Rep., 86; *Bristol Door, Etc., Co. v. Bristol*, 75 Am. St. Rep., 783; *Sings v. City of Joliet*, 127 Am. St. Rep., 323; *Cooley on Constitutional Limitations*, 740-741.

Section 4 merely provides the means by which the ordinance is to be put in operation in a particular case; section 5 provides the judicial proceeding by which the ordinance is to be enforced. If the owner has failed to abate the nuisance within 20 days after receiving notice from the Mayor as provided in section three a proceeding may be begun in the police court. No proceeding can be begun until the owner has had twenty days after notice to remove the nuisance. If a proceeding is begun, and it is made to appear that within the twenty days he abated or removed the nuisance the owner should be discharged. If in such a proceeding it appears that the owner did not abate or remove the nuisance within the twenty days the court may fine the owner as provided

in the ordinance, and order the abatement and removal of the nuisance. In providing for the abatement or removal of the nuisance, the court should follow practically the procedure in other nuisance cases; that is, if the house is unsanitary or out of repair or unsafe for occupation or dangerous or detrimental to the public or injurious to the health or morals of the community the court should determine by his judgment what is necessary to remove the trouble, and in his discretion he may give the owner himself a reasonable time to do the things provided for. In that event no steps will be taken by the Mayor, until the time so given by the court expires, and the Mayor is directed by the court pursuant to section 6 to proceed and execute the judgment of the court. The Mayor should report his acts to the court so that the court may determine if the judgment has been properly executed. If by the judgment of the police court the owner of the property is aggrieved, he can prosecute an appeal to the circuit court of the county. if the cost of abating when added to the fine exceeds \$25; for the cost of abating is part of the penalty imposed, and if his real property is affected by the judgment he can appeal from that court to this court. (*Leitchfield Co. v. Commonwealth*, 143 Ky., 163).

It will thus be seen that the ordinance does not give the authorities of the city of Frankfort the power absolutely to destroy houses intended for dwelling purposes, and that the city authorities are powerless to do anything in the premises except pursuant to a judgment of a competent court, and that if any injustice is done the owner, he has ample remedy to protect himself by appeal. The power to remove nuisances has been exercised by courts of justice from the foundation of the common law. The owner or occupant of the premises is not subject to a fine under section seven unless the house is in the condition described in section 1, and in the exercise of the police power such houses may be required to be vacated. In *Dillon on Municipal Corporations*, the principles governing the subject are thus stated:

“It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act

against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such. \* \* \* It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the State within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities." (Sec. 684).

"But under the power to abate nuisances, property lawfully erected and existing, or a house which is only a nuisance because occupied by a business which is such, cannot be destroyed or demolished. The public can proceed by indictment, or the business carried on in the house be suppressed." (Sec. 688).

"Finally, it may be remarked that the extent of municipal authority over nuisances depends, of course, upon the powers conferred in this regard upon the municipality. They may be general or specific, or both. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance. The authority to declare what is a nuisance is somewhat broader; but neither this nor the general authority mentioned in the last preceding sentence will justify the declaring of acts, avocations, or structures not injurious to health or property to be nuisances." (Sec. 689).

"Tenement houses as popularly known, and also as defined by statute, have been regarded as a distinct class of buildings, susceptible of and requiring regulation by virtue of the police power. It is, therefore, within the power of the Legislature, either directly by statute or by authority conferred upon municipal corporations, to enact rules and ordinances to regulate the manner of constructing these buildings for the purpose of promoting the health and safety of the inhabitants. It is not a valid objection to the exercise of this power that the expense of making changes in such buildings is imposed upon the owner, so long as the object of the law is with-



out doubt the promotion or the protection of the health of the inmates of these houses, or the preservation of the houses themselves, and consequently much other property, against loss or destruction by fire, and so long as the alterations or changes can be effected at a reasonable cost to the owner." (Sec. 698).

In the acts governing cities of the first and second class it is provided that the validity of a city ordinance may be tested by an action in the circuit court, but we find no such provision in the act governing cities of the third class. The petition does not show that relief in equity is required to avoid a multiplicity of suits; for it shows that only one proceeding is contemplated. It does not show that the plaintiff will suffer irreparable injury because it cannot be assumed that the police court will enter an improper judgment; and if he should do so, as we have said, the plaintiff has an adequate remedy by appeal. We, therefore, conclude that the ordinance is valid and that the plaintiff shows no right to relief in equity.

Judgment reversed and cause remanded for a judgment as above indicated.

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### **Maddox v. Rowe, Assignee.**

(Decided June 17, 1913.)

#### **Appeal from Ohio Circuit Court.**

1. **Finding of Chancellor.**—The chancellors' finding of fact will not be disturbed on doubtful evidence.
2. **Mortgages—Executed by Married Woman to Secure Debt of Husband.**—A mortgage executed by a married woman to secure a debt of her husband, will not be adjudged unenforceable on the ground that it was procured by fraud, coercion or duress, when the mortgage was executed intelligently three days after the transactions in which it was charged that the coercion was exercised, and no claim of coercion was made until after the mortgage had passed into the hands of a purchaser with the acquiescence of the married woman in its validity.

BARNES & SMITH for appellant.

HEAVRIN & WOODWARD for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
**Affirming.**

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J. B. Maddox was president of the Bank of Centertown, and while such had fallen in debt to the bank between \$5,000 and \$6,000; on January 26, 1911, he and his wife, Mecie Maddox, executed to the bank a mortgage on the property of the wife to secure this indebtedness. This suit was brought to enforce the mortgage; Mrs. Maddox defended the suit insisting that the mortgage was obtained from her by duress, fraud and coercion. A large mass of testimony was taken; on final hearing the circuit court entered judgment enforcing the mortgage.. She appeals.

The facts of the matter are about these: J. B. Maddox was a merchant in the town of Centertown. Several years before the year 1911, he had a severe attack of typhoid fever, which left him in a very bad condition of health so that he had to go to a sanatorium. While he was gone his business was run by his brother, his niece and his daughter. When he returned from the sanatorium he found his affairs in very bad condition. He had in his own name 13 shares of stock in the bank of Centertown. This stock had been purchased with the money of the wife, but she had allowed her husband to put it in his own name to give him credit. He was the president of the bank and in his efforts to extricate himself from his financial difficulties, created the debt to the bank above referred to. He transferred to his wife eight shares of the bank stock and retained five shares in his own name. But to pay her for these five shares, he and she made a note to the bank for \$500, and this money was placed to her credit in the bank as a time deposit at 5 per cent. She also signed as the surety of her husband another note for \$750; for money which he borrowed and used himself. She was not on any of his other paper to the bank. About January 20, 1911, a State Inspector made an examination of the bank and reported its condition to the Secretary of State, who ordered the bank cashier on January 22 not to open the bank again. Before this notice was given by the State Inspector, he had a conference with certain persons at Beaver Dam, and reports of what had taken place at this conference were circulated to the effect that the Secretary of State had determined to prosecute the officers of the bank for violation of the State banking laws. On the afternoon of January 23, there was a meeting of the stockholders of the bank at the house of the cashier. Maddox and wife were present; also Messrs. Heavrin and Woodward,

who had been invited to be present by some of the persons interested. After a list of the stockholders had been written out, one of the attorneys made a speech to the stockholders in which he in substance said that the banking laws had been violated by the officers of the bank, but that if each of the officers would make good what he had drawn out of the bank, he did not think any prosecutions would be instituted; that he could not guarantee this however, but that it would be greatly to the interest of the community and to the interest of the stockholders if each officer would secure what he owed. Maddox said that he would give up all his property and Mrs. Maddox said that she would stand by her husband and protect his honor with all that she had. Dr. Chapman, a director in the bank, owed it about \$10,000. After Maddox and wife had agreed to secure the bank in what he owed, Chapman's son said that he would see his father, who was sick, and see what he could do. He went to see his father and the result was that he also agreed to execute a mortgage. After this the stockholders agreed to place the bank in the hands of Alvin Rowe. Alvin Rowe was sent for and agreed to accept the trust. A resolution of the stockholders was then drawn up and signed, by which Alvin Rowe was selected as fiscal agent to liquidate the affairs of the bank under the direction of the Secretary of State, and he was requested to give each officer an opportunity to make good any loss arising through the fault of such officer, in default of which the body demanded prosecution of any person whose liability was established, and who refused to make same good to the bank. There is some contrariety in the evidence as to who suggested the latter part of the resolution, the proof for the plaintiff being that Maddox suggested that as he and Dr. Chapman were fixing up their matters, this should be put in so that all the other officers would do likewise. The proof for Mrs. Maddox is that her husband did not make this suggestion and that the attorney drew the resolution in this way without any suggestion from others. The meeting then adjourned. The attorneys returned to Hartford and drew the mortgages which were to be executed by Maddox and wife and Chapman and wife. The papers were sent to Centertown on January 26th, and were on that day executed by Chapman and wife, and Maddox and wife. After this Alvin Rowe took charge of the bank and organized a new corporation styled the Farmers Bank of Centertown; and this bank some months

later took over the assets of the old bank, and assumed its debts. Up to the time that the new bank did this, Mrs. Maddox had in no manner complained of being overreached in the execution of the mortgage, and she made no such claim to the new bank until some time in August when the bank applied to her to close the matter up by deeding to it the property, as the debts exceeded the value of the property. She then insisted that there was a debt of \$1,000 which her husband's brother ought to pay as he was surety on the note and the bank not agreeing to this, she employed an attorney and denied liability. This suit followed.

The proof for her shows that she was in great distress on January 23d, when the meeting of the stockholders was held; that her husband had been in a very bad state of mind for several days, and that she was very apprehensive that he would be prosecuted, and feared that if he was prosecuted he might be sent to the penitentiary. She did not know that she was not bound to pay the note which she had signed as surety for her husband, and it is insisted that she executed the mortgage without consideration under a palpable mistake of law and under the coercion of the threats that her husband would be prosecuted. If the mortgage had been executed on January 23d, there would be more force in this; but the mortgage was not in fact executed until three days later and all the parties had had sufficient time to recover their usual frame of mind. The evidence shows that she was not in an abnormal condition at all when the mortgage was executed, and that she perfectly understood what she was doing. She did not execute the mortgage to secure merely the notes which she had signed as suerty for her husband; she executed it to secure all his indebtedness to the bank, and, as she expressed it, to save his honor. She understood that the Farmers Bank was being formed, and knew that it was proposing to take over the assets of the old bank. She knew that the mortgage which she and her husband had executed was one of the considerations for the new bank taking over the affairs of the old bank; and although several months elapsed before this scheme was carried into effect, she at no time claimed either to Rowe as agent of the old bank or to the officers of the proposed new bank that the mortgage which she had executed was invalid. On the contrary she stood by and allowed this arrangement to be consummated without any notice of such a claim on her part, and

manifestly during this time she was laboring under no excitement or coercion. The mortgage was not executed to compound a criminal prosecution. Before the new bank took over the affairs of the old bank she and her husband had several conferences with Rowe about their matters, but in none of them did either of them claim that the wife had been overreached in the execution of the mortgage, or that it was invalid for any reason.

The question raised by the appeal is simply one of fact. We give some weight to the finding of the chancellor on a question of fact, and we do not disturb his finding where the evidence is conflicting and the truth doubtful. Under this rule we do not see that we can disturb the chancellor's finding here. On the contrary we think his finding is supported by the weight of the evidence.

Judgment affirmed.

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## **Southern Railway Company in Kentucky v. Sanders.**

(Decided June 17, 1913.)

### **Appeal from Anderson Circuit Court.**

1. **Railroads—Trespasser—Lookout Duty.**—A railroad company owes no lookout duty to a trespasser upon its yards, its only duty to him being the duty of exercising ordinary care to protect him after his presence on the track is actually discovered.
2. **Railroads—Licensee—Lookout Duty.**—If, however, a pedestrian is injured at a place where a large number of persons were accustomed to using the tracks and premises of the company, the person injured becomes a licensee, and the company owes him a lookout duty.
3. **Railroads—Use of Yards by the Public.**—Where there was evidence to show that the place in the yards of a railroad company where the appellee was injured, was used by the people generally as a passway, the question of the negligence of the company in failing to exercise a proper lookout duty was for the jury.

WILLIS, TODD & BOND, ALEX. P. HUMPHREY and EDWARD P. HUMPHREY for appellant.

EDWARDS, OGDEN & PEAK for appellee.

OPINION OF THE COURT BY JUDGE MILLER—Affirming.

On March 5, 1910, the appellee, Sanders, lost his foot by reason of it having been crushed by an engine of the

appellant company, in the yards of the company at Lawrenceburg. Upon the first trial he recovered a verdict and judgment for \$5,800; but upon an appeal from that judgment, it was reversed and remanded for a new trial. 145 Ky., 679. The facts connected with the injury are stated in detail in the former opinion and need not be repeated. The evidence upon the former trial did not satisfactorily show that the portion of appellant's yards upon which the house track and the tobacco track were located, and where appellee was injured, was used by the public, at night, to such an extent as to impose a lookout duty upon appellant; and as appellant's case turns largely upon that question, the former opinion considered it at length. The substance of the opinion, in so far as it touched this question, is found in the following excerpt treating of Sanders' relation to the company, to-wit:

"If he is to be treated as a trespasser, the motion for a peremptory instruction to find for the company should have been sustained because the company only owed him the duty of exercising ordinary care to protect him after his presence on the track was actually discovered and the evidence is conclusive that the trainmen did everything that could have been done to avoid the injury after his peril became known. If, however, appellee is not to be treated as a trespasser, but as a licensee and the company owed him a lookout duty, there is enough in the record to take the case to the jury on the theory that his peril by the exercise of the required care could have been discovered in time to have prevented the accident."

If Sanders was a trespasser the company owed him neither a lookout duty nor warning, and appellant's motion for a peremptory instruction should have been sustained; but if a large number of persons were habitually accustomed to using the tracks and premises of appellant company at the place where appellee was injured, appellee was a licensee and the case should have been submitted to the jury. Such were the instructions laid down in the former opinion for the second trial of the case; and in closing, the court said, unless there should be the quantity of evidence indicated, upon the use of the tracks and premises by the public during the night, or about the time appellee was injured, the court should direct a verdict for the railway company.

Upon the second trial appellee recovered a verdict for \$5,000 and from a judgment in accordance therewith,

the defendant prosecutes this appeal. For a reversal, appellant confines its objection to two grounds and insists, (1) that the court should have sustained its motion for a peremptory instruction because the evidence failed to show a use of the yards and track by the public to the extent required by the former opinion; and (2) that the verdict is flagrantly against the evidence. In all respects other than that relating to the use of the yards by the public, the evidence is substantially the same as it was upon the former trial; and appellant insists there is no material difference in any respect. This necessitates a careful review of the testimony upon the subject of the use of appellant's yards and tracks by the public, which we will now give it.

Court street runs about east and west and immediately south of the passenger station, while Woodford street is the next street north of, and runs parallel with Court street. The house track runs along the west side of the station platform, while the tobacco track begins near Court street, at a point some distance from the house track, and joins the house track at or near the north end of the station platform where appellee was injured. The house track and the tobacco track thus form a figure like the letter "V" with its two ends resting upon or near Court street. The large space in between the two tracks was not lighted, except by such light as might penetrate therein from the public lights on Court street, and when persons would walk through the space between the two tracks going north to Woodford street, they would necessarily have to cross the tracks in order to pass over their intersection and get to the main track beyond. The usual way of passing from Court street to Woodford street was along a concrete platform running along the east side of the station, and thence up the cinder path along the main railroad track; but pedestrians would frequently make a short cut across the open space west of the station, and gain the main track at the north end of the platform by crossing over the intersection where Sanders was injured.

Dr. Kavanaugh testified that he was familiar with the use of the railroad yard by the public between Woodford street and Court street, and says it was so used until all the trains came in, which was about 10 or 10:30 o'clock at night. He said he always went that way himself and always met many people, and had gone out from the station with people; and that his family and his

sister's family always came out that way. The substance of his testimony is that people used the yard generally in passing between Woodford street and Court street until after train time at night.

James Crossfield, a former town marshal and deputy sheriff, says he was familiar with the premises about the depot; that the yard of the company was open so that any one could enter from the street; that a good many people would pass through the yard in going back and forth between Woodford street and the company's station; that a man would pass from the open space between the tobacco track and the house track whenever he took a notion to do so; and that a good many people did so use it.

Will Johnson, a deputy county court clerk, lived on Woodford street for twenty years and was well acquainted with the tracks and yard of the railway company between Woodford street and Court street. He says the people living on Woodford street and traveling from Court street to Woodford street would walk over the right of way and tracks of the company up until after train time which was about ten o'clock at night, a great deal; "a good many came that way;" and that many of the people who lived on Woodford street in going to entertainments at the opera house on Court street would walk upon the railroad tracks.

James Selby, lived on Woodford street and testified that when people are near the opera house on Court street and want to go to Woodford street, most of them would go across the railway tracks and some of them would come through town; that people would go to the switch near the east end of the station platform and then walk north in the middle of the main track; and that a good many people passed that way in going from Court street to Woodford street. The foregoing is the substance of the testimony upon this question. In this connection, it will be remembered that the house track and the tobacco track which lie west of the depot, join at the switch near the north end of the station where appellee was hurt and continue thence as a single track north to Woodford street, parallel with the main track which runs in the same direction along the east side of the station, and that the point where appellee was injured lies near the main track. In going from Woodford street to the station pedestrians would follow the main track to a point near the switch where Sanders was in-



jured and thence on the concrete platform; but in going to other portions of the town they would frequently cut across over the switch and through the yards between the house track and the tobacco track; and the evidence shows this last named use was unrestrained and to be expected until after train time at night.

The case is somewhat like Carter's Admr. v. C. & O. Ry. Co., 150 Ky., 529, where we said that if the use of the track by the public for crossing purposes was general and acquiesced in by the railway company, it is charged with notice of such use, and a trespasser becomes a licensee to whom the company owes a lookout duty, although the accident happened in the company's yards. In the Carter case the evidence of the use by the public was no stronger than in the case at bar, and in the Carter case we said the evidence was sufficient to carry the case to the jury.

Again, in C., N. O. & T. P. Ry. Co. v. Harrigan's Admx., 149 Ky., 58, we had before us the question whether the evidence in that case was sufficient to show such a general use of the railroad yards by the public as to make Harrigan a licensee and not a trespasser; and in speaking of the effect of the evidence, we said:

"The substance of the testimony upon this point is, that whenever pedestrians had occasion to cross the tracks in this immediate neighborhood, either for the purpose of going to the mill, or elsewhere, and were not sufficiently energetic and careful to walk up to the overhead bridge, they would walk over the tracks when and as it suited their convenience. To say that this was not an unusual, but on the contrary, was the usual state of case under circumstances of this character, is merely to announce a condition that is generally known to all persons in a city of any size. This evidence was sufficient to carry the question of the use of the tracks to the jury."

So, in the case before us. The yards of appellant were open, and as they afforded a nearer and more direct route for the many persons passing between Woodford street and Court street, or from the north end of the station to Court street, it was but natural, and to be expected, that pedestrians would pass through them when and as it suited their convenience. The evidence shows that this use was continued until after train time, or as late as ten o'clock at night, thus bringing the case within the rule announced in the opinion upon the first

appeal. The evidence was, therefore, sufficient to carry the case to the jury; and the jury being the judges of the weight to be given the evidence, we cannot say, under all the circumstances, that their verdict is flagrantly against the weight of the evidence.

Judgment affirmed.

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## County Board of Education v. Dudley, et al.

(Decided June 17, 1913.)

### Appeal from Hopkins Circuit Court.

1. **Officers—Contract With Under Authority of a Statute.**—One who contracts with a public officer acting under the authority of a statute can contract only in the manner pointed out by the statute.
2. **Schools and School Districts—Employment of Teacher—When Contract Not Enforceable.**—Where a teacher acting under a verbal employment made pursuant to a resolution of a County Board of Education taught a school pursuant to sub-section 8 of section 4426 A of the Kentucky Statutes which empowered the Board of Education to contract for such service, in writing, the teacher had no enforceable contract and cannot recover for his services.

H. F. S. BAILEY for appellant.

C. J. WADDILL for appellees.

### OPINION OF THE COURT BY JUDGE MILLER—Reversing.

Sub-section 8 of the Act of March 24, 1908, incorporated into the Kentucky Statutes as sub-section 8 of section 4426A, provides, in part, as follows:

“Within two years after the passage and approval of this act, there shall be established by the county board of education of each county one or more county high schools: PROVIDED, there is not already existing in the county a high school of the first class, if such high school already exists, and if the county board may be able to make such an arrangement with the trustees or board of education of said high school as will furnish to the pupils completing the rural school course free tuition in said high school, then said high school may be considered as meeting the purpose of this law without the establishment by the board of another high school. The county board of education in the various counties shall

have full power and authority to unite with the governing authorities of any city or town in their respective counties for the purpose of establishing a high school for the joint use of the city or town and such county, and to unite with such authorities for the purpose of maintaining such a high school if one be already in existence. For this purpose said county boards are hereby given full power and authority to make such contracts as they may deem necessary or proper for the establishment and maintenance of such high schools for the joint use of the county and such city or town. Said contract shall be in writing and shall contain full and complete stipulations as to the employment and compensation of teachers, courses of study, payment of the expenses of the school and the control and discipline of the pupils."

For the purpose of complying with this statute the County Board of Education of Hopkins County contracted with the Board of Trustees of the Madisonville Graded Common School District in the spring of 1909, whereby the latter agreed to receive into its established high school all the pupils of Hopkins County who were prepared to take the high school course, at an agreed charge of \$4 per month for each of the first twenty-five pupils so attending, and \$3.50 per month for each pupil in excess of twenty-five. This contract was for three years, and the Madisonville District School was given the exclusive right to teach the county high school for said term.

In 1911 the County Board of Education determined to extend the county high school privileges to the common school graduates who could not attend the Madisonville High School; and in order to carry out this scheme the County Board of Education took action, as is shown from the following extract from its minutes of August 15, 1911:

"RESOLVED, That the County Board of Education ask the Principals of the Earlington, Hanson and Dawson Springs schools to meet with the superintendent of the Madisonville school to prepare a report to the county board relative to the education of our common school graduates, with a view of extending the county high school privileges."

On September 11th, the principles of the Madisonville, the Hanson, and the Earlington high schools joined in a written report to the County Board of Education, in which they stated they believed the high schools at Daw-

son Springs, Hanson, Earlington and Madisonville all filled the requirements of the law for county high schools, and in their judgment the chances for an education would be very much increased to deserving pupils if the high school contract was extended alike to each of those schools. On the same day the County Board of Education took further action, as is shown by the following extract from its minutes, to-wit.

“Moved that the report of the school men be adopted, and that the terms of the high school tuition contract be extended to the schools at Dawson Springs, Hanson and Earlington as recommended, beginning with this school year; and to guarantee that the Madisonville school shall receive a sum not less than one thousand dollars for (from) high school tuition money for school year 1911-1912, provided the entire tuition money of all high schools in the county for the year amounts in the aggregate to that amount; or, should the aggregate tuition fall below this amount, then the Madisonville school shall receive only the amount of such aggregate calculated upon the terms of the contract now in force with the Madisonville school; the sum of high school tuition that may be agreed in excess of this one thousand dollars to be paid to the Dawson Springs, Hanson, and Earlington schools in proportion to the number of high school pupils enrolled by them entitled to the free high school tuition.”

This motion was carried, and by a subsequent resolution of November 11, 1911, a tax was levied to support the schools.

The Earlington school was not a graded school; it was a common school of common school district No. 45, and was taught by teachers, including the appellees, Dudley and Weir, employed by the trustees of Educational Division No. 2 to teach the public school of the common school district. Appellees, Dudley and Weir, taught the high school course under the resolution above set out, having a total of twenty-eight pupils, for which they presented their bill to the County Board of Education for \$886.50. The board refused to pay the bill, whereupon Dudley and Weir instituted this suit and obtained a judgment for the amount claimed, and from that judgment the County Board of Education prosecutes this appeal.

The agreed statement of facts show that there was no regular organized high school at Earlington, and that

all the teaching done by appellees was done in the public school building at Earlington under the control and supervision of the trustees of Educational Division No. 2 and the County Board of Education, and there was no other governing authority over said Earlington High School. There is no contention that the school was not taught, or that the pupils there taught were not eligible to take the high school course, or that the bill is incorrect as to amount. It is contended, however, that as there was no written contract, there was no compliance with the statute, and the appellees cannot recover for that reason.

It will be noticed that the statute above quoted contemplates the establishment of one or more county high schools by the County Board of Education; but if such a high school already existed, it was competent for the County Board of Education to arrange, by contract, with the trustees or Board of Education of such high school to teach the high school pupils who had completed the rural school course, and that such high school course should be considered as meeting the purposes of the law without the establishment of any other or distinct high school by the County Board of Education. The statute further gives the right to the County Board of Education in the various counties full power and authority to unite with the governing authorities of any city or town in the county for the purpose of establishing a high school for the joint use of the city or town and the county, and to be maintained jointly. For the purpose of executing the power thus conferred, the County Board of Education is given power to make such contracts as it might deem necessary or proper, it being expressly provided, however, by the statute that "said contract shall be in writing and shall contain full and complete stipulations as to employment and compensation of teachers, courses of study, payment of the expenses of the school and the control and discipline of the pupils." The purpose of this requirement of the statute is plain. It meant that the high school should be a high school in fact, and not a mere pretense. It was the duty of the County Board of Education either to establish a high school of its own, or to provide one by contract with the governing authorities of an existing high school; but in case it should contract for high school teaching, the contract should be in writing, and should contain full and complete stipulations as to employment and com-

pensation of teachers, courses of study, payment of the expenses of the school and the control and discipline of the pupils.

It is clear from this record that there was no high school existing at Earlington; on the contrary, the appellees were teachers in the common school for that district, and undertook under the contract supposed to have been created by the resolution above set out, to teach a high school course in connection with the common district school. Clearly, this was not a compliance with the statute. In the first place, there was no contract in writing, and the appellant can contract in no other way. The resolution of the board did not constitute a contract, since it was unilateral only and did not bind the appellees to perform any service for the County Board of Education. Furthermore, it did not contain any provision whatever, either complete or cursory, as to the courses of study, payment of the expenses of the school, or the control and discipline of the pupils.

Section 4506 of the Kentucky Statutes, prescribing the duties of teachers, and their employment and discharge, contains this further express provision:

"But no teacher shall be required or under any obligation to teach any other than the common school branches prescribed by the State Board of Education in the common schools, unless it shall be so specified in a written contract with the trustees."

In the case at bar there was no written contract signed by either party, and that being true, appellees are not in a position to maintain an action. *Mingo v. Trustees of Colored School District*, 113 Ky., 475. It is a well established rule that one who contracts with a public officer acting under the authority of a statute, can contract only in the manner pointed out by the statute; otherwise he has no contract. *City of Louisville v. Parsons*, 150 Ky., 420.

It follows that the judgment of the lower court will have to be reversed for further proceedings consistent with this opinion.

**Owensboro Shovel & Tool Company v. Moore.**

(Decided June 17, 1913.)

**Appeal from Ballard Circuit Court.**

1. **Corporations—Actions—Venue—Process.**—An action against a corporation for breach of contract may be brought in the county where the contract was made or to be performed; and summons thereon may be sent to the county of the home office of the company and there served.
2. **Fraud—Statute of Frauds—Agreements Not To Be Performed Within Year—Possibility of Performance.**—A contract, if capable of being performed, although it may not actually be performed, within a year, is not within the statute of frauds.
3. **Trial—Arguments of Counsel—Comments Not Supported by Record.**—Where a lawyer, in argument to the jury, makes statements not supported by the record, the trial judge should, without waiting for objections, promptly reprimand the offending counsel, charge the jury to disregard his statements, and if the comments are of such prejudicial nature as improperly to influence the jury, he should set aside any verdict, rendered in favor of such counsel.
4. **Damages—Contract—Breach—Duty to Minimize.**—Where one has contracted to do a specific work, at an agreed price, upon breach of the contract by the other party, he is under no duty to minimize the damages, unless the agreement exacts of him a personal service or inhibits him from engaging in other employment of like nature.
5. **Trial—Instructions—Measure of Damages.**—In an action for damages for breach of contract to do a specific thing, at an agreed price, the measure of damages is the reasonable profits the party would have made, had he been permitted to complete the contract.

HENRY F. TURNER and SWEENEY, ELLIS & SWEENEY for appellant.

J. B. WICKLIFFE for appellee.

**OPINION OF THE COURT BY JUDGE LASSING—Reversing.**

The Owensboro Shovel & Tool Company is a manufacturing corporation engaged in business in Owensboro, Kentucky. It owned certain timber rights in Ballard County. George Moore owned a saw mill. At the instance of C. P. Moore, an employe of the Owensboro Shovel & Tool Company, George Moore moved his saw mill to a point upon or near the land upon which the timber owned by the Tool Company stood and, under a verbal agreement with C. P. Moore, sawed something

like 2,000 railroad ties. A difference arose between George Moore and C. P. Moore, representing the Tool Company, which resulted in the Tool Company's refusal to furnish any more timber at the saw mill to be sawed into ties.

Thereupon, George Moore filed suit in the Ballard Circuit Court in which he sought to recover \$2,000, alleged to be the profit which he would have made had he been permitted to carry out his contract with the defendant, Tool Company, and the further sum of \$600, alleged as expense incurred by him in moving his mill to and from the defendant's lands. He alleged in the petition that the contract, under which he agreed to saw this timber, was a verbal one, by the terms of which he was to receive eight cents per tie for sawing 50,000 ties in 250 days. The defendant entered its appearance for the purpose of moving to quash the return of the summons, it having been executed upon its agent, C. P. Moore. Thereupon, plaintiff filed an amended petition, making C. P. Moore a party defendant and alleging that the contract was made with C. P. Moore and the Owensboro Shovel & Tool Company, and that it was breached to his damage as set out in the original petition.

A special demurrer, a general demurrer and a motion to strike were, in turn, filed by the defendants, and each being overruled, they filed their separate answers. C. P. Moore denied having any interest in the contract and alleged that, in making the arrangement which he did with plaintiff, he acted simply as the agent of the Owensboro Shovel & Tool Company. The Tool Company, in its answer after traversing all the affirmative allegations of the original and amended petitions, pleaded the statute of frauds and also, by way of set-off, that plaintiff had damaged it in the sum of \$800 by his failure and refusal to saw into lumber timber growing on a tract of land near the mill site, which he had agreed to saw and which they had been unable to procure any one else to saw after his failure and refusal to do so. A reply traversing the affirmative matter in the answers completed the issue. The case was submitted to a jury, with the result that plaintiff recovered a verdict for \$400 against the Owensboro Shovel & Tool Company. A peremptory instruction was, at the conclusion of all the evidence, given in favor of the defendant, C. P. Moore. A new trial being refused, the Owensboro Shovel & Tool Company appeals.



Several grounds are relied upon for reversal, among which may be noted, first, error of the court in refusing to quash the return on the summons; second, error of the court in refusing to sustain the special demurrer to the petition as amended; third, error in instructing the jury; and fourth, misconduct of counsel for plaintiff in argument.

It is insisted that, as appellant's place of business was in Owensboro, Daviess County, Kentucky, and all of its principal officers reside therein, it should have been sued in that county, and the court erred in not so holding on its motion to quash the return of the summons served upon its agent, C. P. Moore, in Ballard County. The petition alleges that the contract was made and to be performed in Ballard County. Section 72 of the Civil Code, after excepting certain actions mentioned in other sections of the Code, provides: "An action against a corporation which has an office or place of business in this State, or a chief officer or agent residing in this State, must be brought in the county in which such office or place of business is situated or in which such officer or agent resides; or, if it be upon a contract, in the above named county, or in the county in which the contract is made or to be performed." \* \* \* Under the latter clause of this Code provision, appellee was clearly authorized to institute his suit in Ballard County and to send his summons to Daviess county, the home county of the corporation, for service there. This was done on the petition as amended, and it is not complained that the service in Daviess County was not made upon the proper officer of the company. Service of summons upon C. P. Moore, the agent in Ballard County was unnecessary.

In *City of Covington v. Limerick*, 19 Rep., 330, it was held that in an action upon a contract the court of the county in which the contract was performed had jurisdiction, and summons might be executed in another county. In *Glasscock v. Louisville Tobacco W. H. Co.*, 31 Rep., 702, it was held that an action might be brought upon a contract in the county where the essential part of the contract was to be performed, although service was had in another county.

The contract, whatever it was, was entered into by C. P. Moore as agent for the Owensboro Shovel & Tool Company, in Ballard County and was to be wholly performed in that county, and under this state of facts, the

trial court properly held that the suit might be prosecuted in Ballard County.

Since the peremptory instruction was given in favor of the defendant, C. P. Moore, it becomes necessary to pass upon the court's ruling on the special demurrer or the motion to strike, as the purpose of each was to eliminate C. P. Moore from the proceeding.

On the contention that the contract, as alleged, was within the statute of frauds, it is sufficient to note that under its terms it was capable of being performed within a year, indeed, within the time alleged by appellee within which it was to be performed, to-wit: 250 days. It is insisted by counsel for appellant that the evidence showed that appellee would not have been able, with the mill power owned by him, to have completed the contract within a year, but he overlooks the fact that appellee was not limited in the performance of this contract to the use of the single mill owned by him. While it is not altogether clear from the evidence that he unaided could have completed the contract within a year, he could certainly have done so by procuring additional sawing facilities. In determining whether a contract falls within the statute of frauds, the inquiry is not directed toward ascertaining whether or not the contract would actually be performed within a year but whether or not it could be performed within a year. *Ford Lumber & Mfg. Co. v. Cobb*, 138 Ky., 174.

This leaves but two grounds relied upon for reversal, and we will consider them in the inverse order of their importance. In addressing the jury in his closing argument, counsel for appellee said: "The defendant notified the plaintiff he would have to quit sawing for it because it was losing money on the ties, and that was the reason the defendant stopped plaintiff from sawing—was because defendant said it was losing money on the ties and was not going to have any more sawed." While the record does not show what the ruling of the judge was, it is apparent that this statement was not excluded from the consideration of the jury or the jury was not warned to disregard it, for it is made one of the grounds for a new trial.

There is no evidence in the record which even inferentially supports this argument or statement of counsel, and it was highly improper, and under the wide range which the evidence was permitted to take calculated to be prejudicial. We have so often held that trial courts

should not permit attorneys, in the presentation of their client's case, to make statements not supported by the record, that it would seem almost unnecessary to repeat it here. We have likewise held that where counsel persists in violating this rule and recovers a verdict, he should be deprived of the fruits of victory thus earned by having the verdict set aside and a new trial awarded. If trial courts would rigidly enforce this rule and promptly set aside verdicts in cases where lawyers had, in argument over the objection of opposing counsel, made prejudicial statements not supported by the record, lawyers would cease offending in this particular. Laxity tends to encourage rather than discourage this practice of indulging in too wide a range on the part of counsel in the presentation of their cases. It should not be tolerated. When a lawyer makes a statement of fact wholly unsupported by the record, the trial court should, without waiting for objection to be made, promptly reprimand the lawyer and instruct the jury to disregard the statement, and where he regards it of such a prejudicial nature that it may improperly influence the jury, he should set aside any verdict obtained in favor of counsel so offending.

Lastly, it is insisted that the court erred in instructing the jury, and this point is well taken. The issue, as made by the pleadings and proof, was a narrow one. Appellee alleged that he entered into a contract with the Tool Company, by the terms of which he agreed to saw for it 50,000 ties at eight cents per tie, and that the Tool Company breached this contract by refusing to furnish the timber out of which to saw the ties. The Tool Company alleged that, under the arrangement made with appellee, no definite number of ties were to be sawed, but that he was to saw into lumber and ties such timber as it furnished to him at his said mill.

While appellee, in his pleadings sought to recover of appellant the money which he had expended in moving his mill to the land from which the timber was to be cut and sawed and in moving it from the land after his contract was alleged to have been breached, his evidence fails to support the pleadings in this particular. He testifies unequivocally that he was to move the mill at his own expense to the land and do the sawing at eight cents per tie, and the item of \$600, set up in his pleadings as damages sustained by him in moving his mill to and from the land should be dismissed from consideration.

Appellant, in its answer, pleaded that appellee, during a part of the time, could have procured other timber to saw and in this way have minimized the damages sustained by him but that he made no effort to do so, and considerable proof was introduced in support of this allegation. This plea, and the proof offered in support of it, should have been rejected by the court, as it constituted no defense to the cause of action set out in the petition. In an action for damages growing out of a breach of contract of this character, it is not incumbent upon the party whose contract is breached to attempt to procure other employment of the same nature, with the view of minimizing the damage. In actions for breach of contract for personal services, the rule is well settled that it is the duty of one, asserting damage because of such breach, to minimize his claim for damages by seeking other employment of the same nature, for in such cases the contract cannot be performed for two different parties.

In *Hollerbach & May Contract Co. v. Wilkins*, 130 Ky., 51, this court had under consideration an action for breach of contract for the sale and delivery of a specific amount of broken rock. It was contended that the complainant should have minimized his damage, and in disposing of the question the court said:

"We do not mean to be understood as limiting the application of the principle of avoidance of damages to breaches of contracts for personal service; on the contrary, the rule is of much broader application, and it would, perhaps, not be going too far to say that the duty of those complaining of violations of contracts to minimize their damages as much as the exercise of reasonable diligence will accomplish is the general rule appertaining to the right to recover damages therefor. The complainant should reduce his damages whenever the principle can be applied without sacrificing any substantial right. A fair illustration of the general application of the rule may be found in the supposition that the breach of the contract under discussion had been by appellee's refusing to deliver to appellant the stone contracted for. It would in the supposed case have been the duty of appellant to go out into the market and buy the stone, and it could only hold appellee liable for the difference between the contract price and what it had to pay for the stone on the market. This, from the very nature of the case, would cover all the damage it sus-

tained by the breach of the contract. But the same principle is not applicable to the breach of contract complained of in this record. Appellee was entitled to enjoy the benefit of the profits of his contract with appellant, and, if he could have made as beneficial a contract with another, he was entitled to the benefits of that also. In other words, he was entitled to carry forward as many such contracts as he could make, and, if he succeeded in making more than one, he was entitled to both profits. Receiving the profits of one such contract would not tend to recoup his loss by reason of the breach of the other."

In *Watson v. Gray's Harbor Brick Co.*, 3 Wash., 283, it was held that, where one who has contracted to do a specific piece of work at an agreed price is prevented from doing so by the wrongful act of the other party, the profit made by the contractor out of other jobs during the time he would have spent on the one in suit, had it been carried out, cannot be shown in mitigation of damages.

As stated, the rule requiring the avoidance of damages has no application to a case of this character. Had the contract required of appellee that he give the sawing his personal attention, he would then have been under the duty of minimizing his damage. *Frazier v. Clark*, 88 Ky., 260.

From a careful consideration of the pleadings and evidence in this case, we are of opinion that the contract under consideration does not fall within that class or line of cases which hold that it is incumbent upon the complainant in an action for breach of contract to minimize his damage by seeking other employment. There is nothing in the contract, either as set up by appellee or as pleaded by appellant, from which it could be fairly inferred that it was within the contemplation of the parties, when it was executed, that the said George Moore was to give the sawing his personal attention, or that he was prohibited from sawing for others during the time provided for its execution. Hence, the jury, in the instructions, should have been limited to a consideration of the question as to whether or not the contract was as alleged by appellee, if it was, its finding should have been for him; if, on the other hand, the contract was as alleged by appellant, its finding should have been for it. On the measure of damages, appellee's recovery should have been limited to the fair and reasonable

profit which the evidence showed he would have made, had he been permitted to carry out the contract.

Because of the improper argument of counsel and error of the court in instructing the jury, the judgment is reversed and cause remanded for further proceedings not inconsistent herewith.

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### Golden v. Cornett, et al.

(Decided June 17, 1913.)

#### Appeal from Perry Circuit Court

1. Vendor and Purchaser—Contract—Construction—Sale—Option.—An agreement providing for the transfer of title to certain lands, at a stipulated price, upon the ascertainment of the title and acreage, and payment of the purchase money, held to be a sale and not an option.
2. Vendor and Purchaser—Contract—Rescission—Abandonment.—Acts of parties to a contract of sale of real estate, to constitute its abandonment, must be positive, unequivocal, and inconsistent with the continuance of the contract.
3. Vendor and Purchaser—Contracts—Condition Precedent—Rescission—Rights of Vendor.—A provision in a contract of sale that vendor shall furnish to the purchaser his title papers and assist in tracing title to the lands thereby sold, is a condition precedent which must be performed, or offered to be performed, before vendor is entitled to rescind for failure of purchaser to ascertain acreage and pay balance of purchase price.
4. Specific Performance—Contracts.—A purchaser having paid to the vendor a part of the purchase money, under a contract of sale of lands, and the vendor being in default as to conditions required of him by the agreement, is entitled to a specific performance of the contract of sale, even after expiration of the time limit for closing the contract.

S. M. WARD, W. W. BELEW for appellants.

WOOTEN & MORGAN for appellees.

#### OPINION OF THE COURT BY JUDGE LASSING—Reversing.

W. M. Cornett and his wife, Evaline Cornett, executed to John E. Golden the following contract of sale for a tract of land lying on Leatherwood Creek in Perry County, Kentucky:

“We, Wm. M. Cornett and Lina Cornett, his wife, hereby sell to John E. Golden, for the sum of \$10 per

acre the land herein described and we agree to convey said land and the fee simple title thereto to him by deed of general warranty and free from any lien, defect or incumbrance. Lying on Leatherwood Creek in Perry County, Kentucky, and bounded:

(Here follows description of lands).

"We agree to furnish to said Golden without delay the title papers for said land, and to assist him in abstracting and showing the condition of the title to said land, and as soon as the title shall be shown to be perfect in us, by complete chain of documentary and recorded conveyance, the said Golden is to have the acreage ascertained by a competent surveyor, and when all this shall have been done we bind ourselves to execute and deliver to said Golden such deed as is herein described, and then he is to pay us the purchase price aforesaid per acre, and we will thereupon surrender possession of said land to him. We agree to do no damage to any of said land or anything upon it, and not to cut any timber upon it.

"It is agreed that the work in ascertaining the acreage, perfecting the title and making the conveyance shall be done before December 1, 1907."

No steps were taken by either party looking toward ascertaining the acreage or examining the title before December 1, 1907, the time specified in the contract.

In November, 1910, W. M. Cornett instituted suit in the Perry Circuit Court against John E. Golden in which he sought to have the writing or deed cancelled and adjudged of no binding force or effect. In May, 1911, Golden answered, and in addition to denying the material averments of the petition, sought to have the contract specifically performed. His answer was made a counterclaim. In February, 1912, he filed an amended answer and counterclaim and made it a cross petition against Evaline Cornett, the wife of W. M. Cornett, and the Ford Lumber & Manufacturing Company. In this amended answer, in addition to denying the material averments of the petition, he alleged that at the time of the execution and delivery of the contract of sale to him, set out above, he paid to W. M. Cornett the sum of \$200 as a part of the purchase price of said land; that neither W. M. Cornett nor Evaline Cornett, his wife, had at any time furnished or offered to furnish to him their title papers to said land and had not offered to assist him in abstracting the title or in showing the correct number of acres in said land;

that he had been ready, able, anxious and willing, at all times since the execution and delivery of the writing to him, upon receipt of the title papers to assist in showing the condition of the title thereto and to have the land surveyed, and to perform all the obligations imposed upon him by the contract; and that, by reason of the failure of the said W. M. Cornett and his wife to furnish him their title papers, he had been delayed in discharging the obligations which the contract imposed upon him. He asked that the contract be carried out according to its terms. He further pleaded that, since the execution of the contract W. M. Cornett and his wife had conveyed, or attempted to convey, the land which they had sold to him to the Ford Lumber & Manufacturing Company, and asked that said company be made a party defendant, which was done.

In a reply plaintiffs traversed the affirmative matter set out in the original answer and counterclaim. Proof was taken, and the case submitted upon the pleadings and proof. The court was of opinion that plaintiff was entitled to the relief sought and so adjudged. The defendant appeals.

A construction of the writing is necessarily involved in a determination of the rights of the parties to this litigation. It is insisted by appellees that it is merely an option, by which appellant was given the right to buy the land at the price named therein, at any time prior to December 1, 1907, and that, not having exercised such right within the time prescribed, any rights which he had thereunder were lost to him. On the other hand, appellant insists that this is an absolute contract of purchase and sale, that he paid, on the day it was executed, \$200 of the purchase money, and that his failure to cause the land to be surveyed and the acreage ascertained within the time prescribed, to-wit: prior to December 1, 1907, was due alone to the fact that appellees did not furnish him with their title papers or assist him in ascertaining that they had title to the land which they had sold and agreed to convey.

Looking to the writing itself which, in the absence of any charge of fraud or mistake in its execution, must be accepted as expressing the contract between the parties, we find that it has all the essentials of a contract of bargain and sale of real estate. It says, "We, Wm. M. Cornett and Lina Cornett, his wife, hereby sell to John E. Golden, for the sum of \$10 per acre the land herein de-



scribed and we agree to convey said land and the fee simple title thereto to him by deed of general warranty and free from any lien, defect or incumbrance." The language used in this first clause of the contract is plain, clear, unambiguous and certain. The only construction of which this language is susceptible is that the grantors have sold their land to the grantee for \$10 per acre and have agreed to make him good and sufficient deed thereto. The sale having been made and the terms agreed upon, the contract then provides for the doing of certain things in order to satisfy the purchaser, Golden, that Cornett and wife owned the title to the lands with which they were dealing and to ascertain the exact number of acres. The contract provides that Cornett and wife should deliver to Golden their title papers for the lands and assist him in abstracting and showing the condition of the title, and when the title should be shown to be perfect in the grantors, the acreage was to be ascertained by a surveyor, and following this, the deed should be executed and delivered, and the land paid for and possession given to the purchaser.

All acts to be done or performed by either party were necessary to establish two propositions, first, that the grantors owned the title to the lands which they, by this writing, agreed to convey, and second, to ascertain the exact number of acres in the tract. None of these stipulations throws any light upon the question as to whether or not it was an option or a contract of sale into which the parties entered. They are aids, as it were, to the parties in carrying the contract into execution. From an examination of the contract as a whole, it is apparent that the parties did not at that time regard it as an option but as a contract of bargain and sale of the land. Indeed, the language, when fairly construed, is not susceptible of any other interpretation.

The only remaining question is, has the conduct of the parties to this contract, since its execution, been such as to warrant the court in holding that there was a mutual abandonment of the contract? Executed in 1907, no steps were taken by either party for more than two years, although each knew that by the terms of the contract the validity of appellees' title was to be established and the acreage ascertained before December 1, 1907. Appellees offer no excuse whatever for their failure and refusal to deliver to appellant their title papers or to assist him in abstracting their title, although appellant al-

leges that sometime after December 1, 1907, he called upon or notified appellees to deliver their title papers to a certain bank in order that they might be used in abstracting the title. Appellees disregarded this notice and at no time furnished, or offered to furnish, appellant with the evidences of their title to said property, nor did they do anything looking toward aiding him in establishing their title; but, with \$200 of appellant's money in their possession, they contented themselves with letting the matter stand and now seek to have the contract of sale, into which they entered, declared null and void and of no binding force or effect, although they admit that, since its execution, they at no time complied or offered to comply with the provisions which the contract, in plain terms, imposed upon them. Are they in a position to do so? May they shelter behind the inaction of appellant and seek to be benefitted because thereof, while while they themselves were in default?

While the obligations imposed by the contract were mutual and reciprocal, they required that appellees should take the initiative. It was incumbent upon them to deliver their title paper to appellant before he was required to do anything. While their failure to deliver their title papers to him or to assist him in any wise in tracing their title might not altogether excuse appellant from attempting to comply with his part of the contract, it certainly stands in the way of appellees in attempting to procure the relief here sought. They are seeking to be relieved from the burden of a contract which they say casts a cloud upon their titles, and at the same time are confessedly in default in the performance of duties which the contract imposed upon them.

In 39 Cyc., 1353, the author states that the acts of parties to a contract, in order to constitute its abandonment, "must be positive, unequivocal, and inconsistent with the continuance of the contract." Measured by this standard, it is apparent that the contract under consideration was not abandoned, for neither party, during the interim between the making of the contract and the date upon which appellees instituted their suit, did or said anything inconsistent with the obligations of the contract, and the intervening time was not so great as to warrant the court in holding that their conduct amounted to an abandonment. Appellees could not have refused to carry out the contract and defeated appel-

lant's rights thereunder, by a failure to furnish him with their title papers or to assist him in ascertaining that their title to said land was good. Good faith on their part required of them more than mere inaction or silence. They were, at least, bound to offer to comply with those terms which the contract imposed upon them, as a condition precedent to the survey of the land, the making of the deed, and the payment of the balance of the purchase price. To relieve themselves of liability, it was incumbent upon them to have offered to comply with their part of the contract and to satisfy appellant that the title to the land in question was good in them. Had they done so, and appellant then had refused to carry out the obligations which the contract, by its terms, imposed upon him, they might, with propriety, have applied to the chancellor for the relief which they are now seeking, but they themselves being in fault are in no position to do so.

If time had been the essence of the contract in this case, and the contract itself had provided that the land was to be surveyed and paid for before December 1, 1907, appellees would still be in no position to complain or claim a forfeiture, for the reason that, by the terms of the contract, it was incumbent upon them to furnish appellant with evidences of their title and to assist in tracing same. So, viewed from any standpoint, it is apparent that such rights as appellant had, under and by virtue of this contract, were neither forfeited nor lost to him by reason of his failure to have his title examined and the acreage ascertained within the time fixed in the contract. See notes to *Boldt v. Early*, 104 Am. St. Rep., 255.

Appellees having received \$200 as a payment on this land at the time the contract was entered into, fair dealing on their part required of them to give notice to appellant that they were ready and willing to have their titled examined, the acreage ascertained and the contract closed. If, after such notice, appellant had taken no steps to carry out the contract, they might, with plausibility, have claimed abandonment on his part. Having failed to avail themselves of this right, they are in no position to claim either a forfeiture or an abandonment. Upon this showing, the chancellor should have denied to them the relief sought and decreed a specific performance of the contract for the land, or so much

thereof as, upon investigation, it is found appellees have title to.

Judgment reversed and cause remanded for further proceedings consistent herewith.

### **Lebus, et al. v. Stansifer, et al.**

(Decided June 17, 1913.)

#### **Appeal from Kenton Circuit Court (Criminal Common Law and Equity Division).**

1. Corporations—Suit by Stockholder for Himself and Other Stockholders to Correct Management of—When May Be Prosecuted.—Ordinarily a stockholder may not sue upon behalf of himself and other stockholders to correct an evil in the management of a corporation until the managing board has been requested to take such action, and has refused, but where the managers or directors of the corporation bear such a relation to the matter as to show that they would not from the very nature of things listen to any request to institute an action to remedy it, a stockholder on behalf of himself and other stockholders, who are similarly situated, may proceed to prosecute the suit without making any such demand upon the managing authorities of the corporation.
2. Corporations—Suit by Stockholder for Himself and Other Stockholders to Correct Management—When May be Permitted to Sue for Themselves and Others—Pleading.—Where a district board of a burley tobacco society was not conducting the affairs of the corporation in such manner as to satisfy numerous of its stockholders in the matter of carrying out the terms of a pooling contract, in an action by two of the stockholders of the society for relief from the alleged mismanagement, the allegation being that there are something like 40,000 poolers, who in all respects are similarly situated as appellants, it was not improper for the plaintiffs to be permitted to sue not only for themselves, but for all the poolers.
3. Corporations—Section 551, Kentucky Statutes—Intent to Prevent Incorporators from Getting Control Contrary to Wishes of Majority of Stockholders.—In enacting section 551 of the Kentucky Statutes, the Legislature had in view the idea of preventing the incorporators from getting initial control of corporations at the inception of their organization contrary to the wishes of a majority of the stockholders. Under the provisions of this section, it is not within the power of the incorporators to designate in the articles of incorporation an initial board of directors without any action upon the part of the stockholders.
4. Corporations—Placing of Stockholder's Shares in Voting Trust Without His Consent—Right of One to Control His Own Prop-

erty.—It is well grounded in our fundamental law that there is no limitation upon one's right to control that which is his own, except such restrictions as might be imposed by law, and it would be such a limitation to hold that a stockholder's shares may without his consent be placed in a voting trust either by a charter provision or otherwise, and he deprived completely of their control, even upon the ground that it was for his own as well as for the general good.

5. **Estoppel—Ratification—Intent to Ratify Must Be Shown.**—Before there can be an estoppel, or before one's acts will be deemed to have been a ratification, it is essential that he should be in full possession of all the facts about the transaction, and being in possession of such facts, his conduct with reference thereto must be such as to show an intention to ratify what was otherwise an unauthorized act upon his part, or that of his agent.

PENDLETON, BUSH & BUSH, R. C. SIMMONS, J. H. HAZELRIGG, ALLEN & DUNCAN and O'REAR & WILLIAMS for appellants.

J. L. VEST, WM. A. BYRNE and J. G. TOMLIN for appellees.

#### OPINION OF THE COURT BY JUDGE TURNER—Affirming.

The Legislature of this State in 1906 passed what is known as the "Pooling Act" wherein any number of persons were authorized to pool their crops for the purpose of obtaining a higher price therefor than they might receive by selling the same separately or individually. The validity of that act was upheld in an opinion by Judge Carroll on a motion to dissolve an injunction, all of the Judges of this court participating except one. (*Owen County Burley Tobacco Society, &c. v. Brumback*, 32 Rep., 916).

Following the passage of that act there was incorporated under the laws of this State, without capital stock, The Burley Tobacco Society, the purpose of which was to promote the interests of the growers of Burley tobacco, and to act as the agent of growers in handling and selling their tobacco, and to aid them in securing remunerative prices therefor. It was provided that the affairs of the corporation should be conducted by a Board of Directors consisting of one member from each county wherein Burley tobacco was grown.

The plan of organization adopted was that the growers of such Burley producing counties should meet at their respective voting places on a given date, and elect a member of the County Board of Control (a subsidiary corporation to the Burley Tobacco Society); and in turn the members of such County Board of Control should

thereafter meet at the county seat and elect a chairman of such board for said county, and a director for such county in The Burley Tobacco Society; but under a provision of the by-laws adopted by The Burley Tobacco Society, only such growers of tobacco as might have pooled their tobacco with it for that year were entitled to participate in the precinct meetings for the election of members of the County Board of Control and Directors.

Under this plan the pools of the 1906 and 1907 crops of Burley tobacco were had; but in the progress of managing these pools certain difficulties were encountered which necessitated in the opinion of the managers of The Burley Tobacco Society the organization of another and companion corporation which should have capital stock, and be clothed with authority to do certain other things in connection with The Burley Tobacco Society to successfully carry out the pool idea.

Accordingly the plan was conceived of organizing in 1909 a pool of Burley tobacco, and procuring each pooler to subscribe a certain per cent of the gross proceeds of the sale of his 1909 crop to the capital stock of such companion corporation to be thereafter incorporated, and to be called the Burley Tobacco Company. The pool of 1909 was organized and about 40,000 growers of Burley tobacco joined, and among other things the pooling contract provides this:

"The undersigned further subscribe for shares of the capital stock to the amount equal to 10 per cent of the gross sales of the tobacco hereby pledged in the Burley Tobacco Company, to be incorporated, and authorize the Burley Tobacco Society to pay for said stock out of the proceeds of said tobacco when sold."

Thereafter and on the 22nd of October, 1909, the Burley Tobacco & Insurance Company was incorporated, the articles of incorporation of which provided, among other things, that the said Company might issue policies of insurance on tobacco pooled with The Burley Tobacco Society; but after the adoption of the articles, upon advice that the Company could not do an insurance business without depositing certain funds with the state authorities, in December, 1909, amended articles incorporating the Burley Tobacco Company were filed eliminating the insurance feature.

Among other things, it is provided in the amended charter:

“That the shares of stock shall be issued to the several beneficial owners thereof and the power to vote said stock shall be vested in the individuals who constitute from time to time the District Board of the Burley Tobacco Society, who shall continue to act until their successors are elected and qualify.”

The incorporators of the Burley Tobacco Company were the persons who at the time constituted the Board of Directors of the Burley Tobacco Society. It is further provided in the amended articles that the incorporators named therein shall act as Directors until the annual election in 1910, and until their successors are elected and qualify.

There was no pool of Burley tobacco either in the years 1910 or 1911, and consequently, there was no election of directors of the Burley Tobacco Company for those years; but in 1912 there was a pool of Burley tobacco, and consequently, as provided by its charter, in October, 1912, there was a stockholders' meeting of the Burley Tobacco Company, at which the persons composing the District Board of The Burley Tobacco Society assumed the right to vote, and did vote under the provisions of the charter of The Burley Tobacco Company above quoted, all the stock of the 40,000 poolers who had signed the 1909 pooling contract.

Immediately thereafter, and on the 7th day of October, 1912, appellees Stansifer and Hudson, for themselves and the other 40,000 growers of tobacco who had signed the 1909 pooling contract, instituted this action in the Kenton Circuit Court against the members of the District Board of The Burley Tobacco Society who were assuming to act as Directors of The Burley Tobacco Company, and The Burley Tobacco Society, setting up in substance the facts above related, and praying for various kinds of relief.

The defendants answered giving at length and in detail a history of the organization; and the lower court on the face of the pleadings, and after passing upon the demurrers by each party, entered a judgment to the effect that the appellants were not, and had never been legal directors of The Burley Tobacco Company, and that the provisions of the charter of The Burley Tobacco Company as amended relating to the method of electing and constituting the board of directors thereof was illegal and void, and in violation of the laws and constitution of this State; and appointed commissioners to hold an elec-

tion for directors of said company in the fall of 1913, at the time fixed in the charter. From that judgment this appeal is prosecuted.

Under this state of the record we are confronted with five questions:

(1) Have appellees the right to sue on behalf of all the poolers in the 1909 pool?

(2) Under our law can the incorporators of a corporation lawfully designate themselves as directors thereof?

(3) Is the provision of the charter of The Burley Tobacco Company placing the power to vote the stock of the poolers in the hands of the Board of Directors of The Burley Tobacco Society in contravention of the law of this State?

(4) Have the poolers by the provisions of the pooling contract, or in any manner, parted with their right to control and vote their own stock?

(5) Are the poolers estopped to assail the provisions of the charter of The Burley Tobacco Company by reason of the proceedings at the meeting of the Board of The Burley Tobacco Society in 1909, and did the poolers acting through their representatives at that meeting ratify or approve the action of the Board of Directors in attempting to take from them the right to vote their own stock?

(1) Ordinarily a stockholder may not sue upon behalf of himself and other stockholders to correct an evil in the management of a corporation until the managing board has been requested to take such action, and has refused (Morawitz, Section 239-241); but where the managers or directors of the corporation bear such a relation to the matter as to show that they would not from the very nature of things listen to any request to institute an action to remedy it, a stockholder on behalf of himself and the other stockholders, who are similarly situated, may proceed to prosecute the suit without making any such request or demand upon the managing authorities of the corporation. (Morawitz, Sec. 242, 10 Cyc., 978; *Chilton v. Bell Co. C. & I. Imp. Co.*, 153 Ky., 775).

It would have been in this case the merest folly for the plaintiffs to have made a request of the Board of Directors that they should institute an action seeking to have it adjudged that they themselves were not the lawful directors of The Burley Tobacco Company, and that they were usurpers and acting without authority. From



the very nature of things, it would have been out of the question to expect them to institute such a proceeding, and it would have been more than useless to have requested them to do so.

The allegation being that there are something like 40,000 poolers of the 1909 crop who entered into the pooling contract of that year, and who are in all respects similarly situated with reference thereto, it was not improper for the plaintiffs in this case to be permitted to sue not only for themselves, but for all poolers.

(2) It is provided in section seven of the amended articles of incorporation of The Burley Tobacco Company that:

“The affairs of this corporation shall be managed by a Board of Directors to consist of not less than ten nor more than one hundred members as may be prescribed by the by-laws. The incorporators hereof shall act as directors until the annual election in 1910, and until their successors are elected and qualify.”

It is claimed for appellees that this provision is directly contrary to our statute directing how corporations may be organized and the initial steps which shall be taken. Section 551 of the Kentucky Statutes is a part of the general law dealing with corporations, and deals specifically with the manner of their organization. Among other things, it provides:

“All elections for directors shall be by ballot, and shall be held in this state; and, in the first instance, the directors shall be elected at a meeting held before the corporation is authorized to commence business.”

Evidently the Legislature had in view when it enacted that section the idea of preventing the incorporators from getting the initial control of corporations at the inception of their organization contrary to the wishes of a majority of the stockholders. The language of that section is clear and unambiguous. It leaves nothing for interpretation.

This is not as counsel for appellants seem to think purely a moot question since the election in 1912; because, if the pretended election of the board of directors in the fall of 1912 was void then under the charter provision if that be valid, the original directors named in the charter would hold until their successors are elected and qualify, and they are still directors under the original designation, independent of the election of 1912. We have concluded that under the express provision of the

statute quoted, it is not within the power of the incorporators to designate in the articles of incorporation an initial board of directors without any action upon the part of the stockholders.

The other questions are so closely related to each other we will discuss them together.

It is the contention of the plaintiffs that the attempt to create in the articles of incorporation the voting pool or trust is contrary to the provisions of section 207 of our Constitution, and section 552 of the Kentucky Statutes; but in our view of the matter it is unnecessary to determine that question. The provision quoted was in law fraudulent and void for another and different reason. It was manifestly inserted by the incorporators, who were at the time the Directors of The Burley Tobacco Society, for the purpose at the very inception of the new corporation to wrest its control from the great mass of stockholders, and perpetuate that control in themselves. Independent of any constitutional or statutory provision, in the absence of the consent of such stockholders such a provision cannot be upheld. The right to control one's own property is inherent; and while the courts have upheld voting trusts and pooling arrangements by stockholders where they are made with full knowledge of all the conditions, and are designed to effectuate some common purpose for the common good and have been voluntarily entered into, we are aware of no instance where individual rights have been so far abridged as to hold that a stockholders' shares may without his consent be placed in such a trust, either by a charter provision or otherwise, and he deprived completely of their control, even upon the ground that it was for his own as well as for the general good. It is well grounded in our fundamental law that there is no limitation upon one's right to control that which is his own, except such restrictions as might be imposed by the law of the land. Any other rule would be subversive of that individual responsibility which is the key-note of all civilization and progress. To say that appellants may without the consent of the poolers have inserted in the articles of incorporation a clause taking from the poolers the right to control that which is theirs, and place its control absolutely in their own hands, would be to recognize a most unwarranted assumption of authority. There is no more sacred duty confided to the courts than the upholding of individual rights in property, and no considerations of temporary advantage

which it is thought might accrue to the growers generally, will justify them in departing from the well beaten paths so clearly defined in all English and American jurisprudence.

We are called upon in this case by appellants' counsel to pass upon what they assume to be the controlling question, viz.: Whether or not the voting rights in stocks may be separated from the beneficial ownership; the deeper question is whether one may be deprived of the control of his own without his consent upon the plea that it is for his own as well as the general good.

The wording of the pooling contract wherein each pooler agreed to subscribe to the capital stock of the proposed Burley Tobacco Company to the extent of 10 per cent of the gross sales of his pooled tobacco, can be construed to be nothing more than authority to The Burley Tobacco Society to pay for such stock out of the proceeds of such tobacco when sold. There is nothing in it which could be tortured into meaning, or from which it might be remotely inferred, that the pooler intended to in any way give up or relax his own control over the stock which he then agreed to buy; and the action of the Board of Directors of The Burley Tobacco Society thereafter in trying to take from them that right, was without semblance of authority, and upon its very face the most indefensible usurpation.

It is in effect pleaded by the defendants that in the fall of 1909 at a meeting of the District Board of The Burley Tobacco Society, and before the Burley Tobacco Company was incorporated, there was a full and deliberate discussion of said contemplated articles of incorporation, and that the same had been considered by the poolers throughout the entire Burley district, and that each of the poolers delivered their tobacco to The Burley Tobacco Company, and stored it with said company after said articles of incorporation were recorded in Fayette county and in the Secretary of State's office, and each of the poolers accepted from it warehouse receipts for their tobacco, and that by reason of this and other similar acts of recognition upon the part of the poolers, they have ratified the articles of incorporation and are estopped to deny them.

But there is no allegation in the answer that the plaintiffs or any of the poolers of 1909, other than the incorporators themselves, knew during all these transactions that there had been inserted in the articles of incorpora-

tion the provision by which the poolers had been deprived of the right to control their own stock in it.

Before there can be an estoppel, or before one's acts will be deemed to have been a ratification, it is essential that he should be in full possession of all the facts about the transaction, and being in possession of such facts, his conduct with reference thereto must be such as to show an intention upon his part to ratify what was otherwise an unauthorized act either upon his part, or that of his agent. (10 Cyc. 1079. Kenyon Realty Co. v. National Deposit Bank, 140 Ky., 133).

It is suggested in argument that unless this provision in the charter of The Burley Tobacco Company is upheld, and the right of the directors to vote the stock of the poolers sustained, this stock or enough of it to secure control may fall into the hands of the tobacco trust, or others unfriendly to the growers, and that the purposes of their organization will thus be defeated, and they will again be at the mercy of the trust.

This would be a legitimate and forceful argument to present to the growers themselves, and if they could be induced to *voluntarily* enter into some fair and equitable arrangement of this kind, it would doubtless be to their interest.

But the expediency of such an arrangement is not for the courts; they must pass upon the legality of things as they find them.

Assuming that these threatened dangers are not exaggerated, and that the interest of the growers would be conserved by maintaining the present status, the courts would not be justified in arbitrarily disregarding sacred individual rights even to further so worthy a cause.

Judgment affirmed.

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### **Merchants Ice & Cold Storage Company v. Commonwealth, By, et al.**

(Decided June 17, 1913.)

#### **Appeal from Franklin Circuit Court.**

1. **Taxation—License Tax on Ice Factories—Proceeding by Revenue Agent—Construction of Statute.**—In a proceeding by a Revenue Agent against appellant whose business is that of manufacturing ice and conducting a cold storage business, seeking to tax its

total capital stock at the rate of thirty cents on each \$1,000 thereof, under the provisions of the Act of 1906, Held, Under the provisions of section 4224 of the Kentucky Statutes, which is the general law fixing license taxes, appellant is liable to pay a license tax on each of its ice factories, and as alleged in its answer it does pay the same; and if its sole business was the manufacture and sale of ice, under the express provision of section 4189a, of the Kentucky Statutes, it would be wholly excepted out of the provision requiring the payment of a license tax on its capital stock. It would be doing violence to the very plain provisions of that section to say that it was liable for the payment of such license tax on its capital stock which is employed by it in the manufacture and sale of ice.

2. Taxation—Revenue Statutes—Construction of.—Courts will not construe revenue statutes so as to bring about double taxation when any other reasonable interpretation can be put upon them.
3. Taxation—Where a Manufacturing Company Both Manufactures Ice and Conducts Cold Storage Business—Payment of License Taxes.—Where a manufacturing company conducts both an ice manufacturing business and a cold storage business, and pays a license tax only on its ice factories, it is liable for the payment of a license tax on so much of its capital stock as is employed, or used by it in the conduct of its cold storage business.

GIBSON & CRAWFORD for appellant.

ARTHUR E. HOPKINS and McQUOWN & BECKHAM for appellees.

#### OPINION OF THE COURT BY JUDGE TURNER—Reversing.

Appellant is a domestic corporation engaged in manufacturing and selling ice, and in conducting a cold storage business in the city of Louisville.

This action was instituted against it by a Revenue Agent seeking to tax its total capital stock of \$1,500,000 at the rate of thirty (30) cents on each \$1,000 thereof under the provisions of the revenue act of 1906. The petition alleges that under the act it was the duty of the defendant to file with the Auditor of Public Accounts on or before the first day of February in each of the years of 1907, 1908, 1909, 1910 and 1911 a verified report showing, among other things, the total amount of its authorized capital stock, the value of the property owned and used by it in Kentucky, and out of Kentucky, the aggregate amount of business transacted by it during the preceding year, and the proportion of such business transacted in Kentucky, in order that the Auditor might ascertain the amount of taxes due by it; and that it failed in each of these years to file any such report, and it is

alleged that said revenue act provides that such failure to so report shall be deemed conclusive evidence that such corporation so failing, elects to pay such tax upon its entire authorized capital stock; and makes it the duty of the Board of Valuation and Assessment to so fix its license tax, and alleges that it was so fixed by such Board for each of the said years; that notice of such action of the Board was given the defendant, and that it failed to appear before the Board either in person or by attorney within thirty days thereafter, and that thereupon the said assessment became final.

The defendant answered denying its liability for the tax upon the ground that during each of the years named, it was liable to pay, and did pay to the State a license tax to carry on its business; and alleging further, that its principal business was that of operating ice factories for the manufacture and sale of ice, and that its other business was merely incidental to, and a part of the business of manufacturing ice; and that during each of the years named it paid to the State a separate annual license tax on each of its six ice factories in Jefferson County.

To this answer a demurrer was sustained, and the defendant declining to plead further, the court rendered a judgment against appellant for the full amount of the tax on its capital stock at thirty cents per \$1,000 for each of the years named.

The correctness of this ruling depends upon an interpretation of the statute, and brings us to the consideration of two questions:

(1) Is appellant within the class of excepted corporations designated by the statute.

(2) Even if that part of appellant's capital stock which is employed in the manufacture and sale of ice is exempt by reason of the payment of the license tax on the ice machines, is that part of its capital stock employed in the business of operating cold storage plants also exempt?

The two sections involved are sections 4189a and 4189c of the Kentucky Statutes, and are as follows, to-wit:

"4189a.—All corporations having capital stock divided into shares, organized by or under the laws of this or any other state or government owning property or doing business in this State, except foreign insurance companies, whether fire, life, accident, casualty or indemnity, foreign and domestic building and loan asso-

ciations, banks and trust companies, and all corporations which, under this act or the general law, are liable to pay a franchise or license tax, shall pay to this State an annual license tax based upon its authorized capital stock, as hereinafter provided."

"4189c. Domestic and foreign corporations shall pay an annual license tax of thirty cents on each one thousand dollars of that part of their authorized capital stock represented by property owned and business transacted in this State, which shall be ascertained by finding the proportion that the property owned and business transacted in this State bears to the aggregate amount of property owned and business transacted in and out of this State.

"Provided, That such corporations may pay at said rate upon their entire authorized capital stock; and in that event they shall not be required to report as in subdivision number three (3) of section four (4) (4189d) hereof. And their failure so to report shall be deemed conclusive evidence that such corporation elects to pay upon its entire authorized capital stock, and it shall be its duty so to do, and the duty of the board of valuation and assessment so to fix its license tax."

(1) Under the provisions of section 4224 which is the general law fixing license taxes, appellant is liable to pay a license tax on each of its ice factories, and as alleged in its answer, it does pay the same; and if its sole business was the manufacture and sale of ice, under the express provision of section 4189a, it would be wholly excepted out of the provision requiring the payment of a license tax on its capital stock. Indeed it would be doing violence to the very plain provisions of that section to say that it was liable for the payment of such license tax on its capital stock which is employed by it in the manufacture and sale of ice.

Such a construction would result in a double taxation, and the courts will never construe revenue statutes so as to bring about double taxation when any other reasonable interpretation can be put upon them. (Commonwealth v. Ledman, 127 Ky., 603.)

(2) There is no allegation in the answer that the defendant is liable to pay, or does pay any license tax in its cold storage business; in fact, so far as we have been able to find, there is no provision requiring the payment of any such tax. Then we have a large corporation with a capital stock of \$1,500,000 engaged in two kinds of business, and paying a license tax to the State upon only

one of them. That is to say, it pays no license tax whatever either upon its cold storage business, or upon that part of its capital stock which is employed in, and engaged by it in the cold storage business.

The contention that the cold storage business is merely incidental to, and a part of the ice manufacturing business is manifestly unsound. Because ice is necessary in conducting the business of cold storage, it does not prevent the cold storage business from being a separate and distinct business from that of manufacturing ice. Ice is as equally necessary in conducting a saloon business as in running a cold storage plant; but it would hardly be argued that if a corporation was engaged in the manufacturing of ice, and also in running a saloon, that the payment of the license tax provided by the general law on the ice manufacturing business would exempt it from the payment of the tax provided for by law in the saloon business.

Because a corporation is authorized by its charter to engage in more than one kind of business, and the general law requires it to pay a license tax only on one kind, should that part of its capital stock which represents its investment in the other kind of business be exempted from the payment of a license tax on its capital stock under the statute? Clearly, we think not; it was the plain purpose of the statute fixing the license tax on the capital stock of corporations to require such corporations who pay no franchise or license tax on their business to pay a license tax on their capital stock. In the case of *James, Auditor, v. Kentucky Refining Co.*, 132 Ky., 353, there was a kindred question to this. The refining company was a corporation, the principal business of which was the manufacture of oil from cotton seed; but incidentally it owned and operated its own tank cars for the transportation of the oil under some arrangement with the railroads. There was assessed against it a franchise tax upon its business of transporting oil; it sought to avoid the payment of a franchise tax, among other reasons, because the use of the cars was a mere incident to its business. The court in answering that contention said:

"It does not appear to us to be material whether the person exercising the privilege is engaged in it as a sole occupation or not. Indeed, several of those named in the statute may be lawfully exercised by a single corporation, a firm or a single individual, such, for example, as electric light companies and water companies. Yet if such



was the case, and in addition the same concern manufactured and sold ice, or even if the latter were its principal business, it would not be excused from paying not only one but two franchise taxes; one upon its business as an electric light company, and another upon its business as a water company."

In that same case the company urged as a reason why it should not pay the franchise tax, that it had paid the license tax on its capital stock under the statute above quoted. The court said in response to that:

"Appellee complains that it reported under the Morris Bill (Revenue Act 1906, Laws 1906, p. 88, c. 22) and was assessed and paid a license tax for the year in suit (1907) upon its capital. It or the taxing officers, one or all, may have erred, but that will not prevent a correct application of the law when invoked by the taxing power. Doubtless, credit may be had on the tax now sought to be enforced for any excess, if there was any, so paid on the other assessment, for appellee was undeniably liable on its capital, for the tax due under the act of 1906, so far as the capital was not employed in this carrying business."

The reasoning of the court in that case taken in connection with the plain object of the statute under consideration, makes it clear that appellant is liable for the payment of the license tax on so much of its capital stock as was employed or used by it in the conduct of its cold storage business.

Upon the return of the case the court will ascertain what part of the capital stock of appellant was employed by it in the conduct of its cold storage business, and enter a judgment accordingly.

Judgment reversed for further proceedings consistent herewith.

## **The Funeral Directors' Association v. Bax.**

(Decided June 17, 1913.)

Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).

**Association of Funeral Directors—Construction of Resolution Adopted By.**—A resolution adopted by a voluntary association of funeral directors, providing that "no member of the association use or

purchase an auto hearse, auto carriage, auto flower wagon or auto casket wagon for funeral purposes without first submitting same to be approved by the Association," did not deny to a member who had a contract for burying the pauper dead the right to use an auto vehicle in conveying their remains from the charitable institution in which they died to the places where their bodies were disposed of. It contemplated a funeral as the word funeral is generally understood, with interment in a cemetery or graveyard in the presence of the family or friends or acquaintances of the deceased.

BURNETT, BATSON & CARY for appellant.

LAWRENCE S. LEOPOLD, JOSEPH E. CONKLING for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The Funeral Directors' Association is composed of undertakers engaged in business in Jefferson County, Kentucky, and in Floyd and Clark Counties, Indiana, in which counties are situated the cities of Louisville, New Albany and Jeffersonville. The purpose of the Association, as expressed in the preface to its constitution and by-laws, is:

"The promotion of harmony in business, the cultivation of a more friendly spirit socially, to inculcate the principle of purity of character, temperate habits and a professional education and ability that shall be a standard by which Funeral Directors may practice the profession, to disseminate correct principles of business management, the best methods of protecting the interest of Funeral Directors in professional practice, as well as those of patrons, and to promote the welfare of all recognized, legitimate Funeral Directors."

The membership fee in the Association is \$500, and it appears that with few exceptions all of the undertakers in the cities named, are members. One of the members of this Association is the appellee, L. D. Bax.

In 1910 the Association adopted the following resolution or by-law, "that no member of the Association use or purchase an auto hearse, auto carriage, auto flower wagon or auto casket wagon for funeral purposes without first submitting same to be approved by the Association," and at the time of its adoption the appellee, Bax, was a member of the Association, and if not present when the by-law was adopted, had notice of its adoption, and either approved or at least did not oppose it.

In the early part of 1912 charges were preferred in the Association against Bax for violating this resolution in purchasing and using in his business as an undertaker an auto wagon for funeral purposes. He was notified of the charge against him and requested to desist from using in his business for funeral purposes the vehicle objected to, but it appears that, insisting that he did not use the auto vehicle for funeral purposes, he declined to accede to the request of the Association, and thereupon he was suspended from membership. Soon after this he brought this suit against the Association and asked an injunction compelling it to set aside the order of suspension and to permit him to enjoy all the rights, benefits and privileges of a member of the Association.

After the pleadings had been made up and the evidence taken the chancellor who heard the case entered a judgment reciting that the resolution referred to applied only to auto vehicles which were used by its members for funeral purposes and that the auto vehicle of Bax was not used by him for funeral purposes within the meaning of the resolution, and it was "therefore considered and adjudged by the court that the defendant corporation, its officers and members, be and they are, and each of them is, hereby perpetually enjoined and restrained from in any manner interfering with the plaintiff in his use of said auto vehicle for the transportation of bodies for other than funeral purposes because of any claim that such use is prohibited by the said resolution hereinbefore quoted."

From this judgment the Association prosecutes this appeal asking a reversal upon the ground that the court had no jurisdiction to afford relief, as no pecuniary interest or property right was involved, and upon the further ground that the judgment entered was based upon an erroneous conception of the facts of the case.

The appellee, Bax, the only witness in his own behalf, testified in substance that the president and secretary of the Association had used for a long time automobiles in making what are denominated first calls on funeral occasions, and that the resolution in question, which was adopted by the Association, had never been enforced against these two members. He also testified that under some contract or arrangement with the city of Louisville he had charge of the burial of the pauper inmates of the charitable institutions of the city, and

that one of these institutions was located about fourteen miles from the city and the other four or five miles, and, having a great many calls to remove dead bodies from these places, he purchaser an auto vehicle for use in this class of work alone. That he had never used an auto vehicle of any kind in connection with the funeral of any person except the charity or pauper patients who died at these institutions. That the vehicle he used in this line of his business could not be fairly called a hearse but would rather come under the description of a wagon, which took the place of the wagon or vehicle he had formerly used.

He further testified that he did not regard the transportation of the inmates of these institutions to the places of burial or to the medical hospitals where the bodies were sometimes disposed of, as being a funeral in the generally accepted meaning of the word or in the meaning of the word as used in the resolution.

He further testified that membership in the Association, aside from the property right growing out of the membership fee, was valuable in the dealings of the members with the National Casket Company, a large concern engaged in the business of furnishing coffins and undertakers' supplies. That this company had some kind of an arrangement with the Undertakers' Association by which it would not furnish expeditiously, or in the ordinary course of business, undertakers' supplies to undertakers who were not members of the Association, or, if it did furnish them, it would do so rather reluctantly and place in the way of the order as many little obstructions as it could do consistently with its ostensible purpose to treat all undertakers alike whether they belonged to the Association or not.

Pearson, the president of the Association, the only witness in its behalf, said in substance that the cost of motor funeral vehicles was very high and that only a few members of the Association could afford to buy or use them in their business, and the resolution was adopted to prevent members who might be able to buy these high price vehicles from purchasing them and thereby injuring the business of other members of the Association who could not afford to purchase these expensive vehicles. He further said that he and perhaps one or two other members of the Association had regular passenger automobiles that they used in making what are termed first calls on funeral occasions, but that no

member, except Bax, had ever used one in the carriage of dead bodies or for any funeral purpose.

He also insisted that the use to which Bax was putting this motor vehicle was a funeral purpose within the meaning of the resolution and that the example of Bax would probably have the effect of inducing other members of the Association to purchase motor vehicles for use in funeral services, and thereby the entire purpose of the resolution would be frustrated.

He further said in speaking of the use to which appellee put the motor vehicle purchased by him in the transportation of dead bodies from the charitable institutions, that the main object of their removal from the institutions was to deliver them to some of the medical universities. That none of the bodies that he moved were hauled to any graveyard or buried or anything else. "There is no funeral connection with it whatever."

The chancellor, in granting to appellee the relief prayed for, expressed the opinion that the use to which appellee was putting the motor vehicle objected to by the Association was not a funeral purpose within the meaning of the resolution, and we are disposed to agree with this view of the matter. This conclusion makes it unnecessary to go into the question of the reasonableness of the resolution or the right of the Association to suspend or expel a member for disobedience of it.

While the removal of bodies of pauper patients from charitable institutions to a place of burial or to some medical school might, in a broad sense of the word, be termed a funeral, as it involves the disposition of dead bodies, we do not think the use of the words "funeral purposes" in the resolution contemplated funerals such as those in which Bax used this motor vehicle. Of course the burial of the poor, when the obsequies are attended by their families or friends or acquaintances, however few the number or humble the equipage, is as much a funeral as if the interment was attended with all the pomp and ceremony that accompanies the burial of the rich. But it seems obvious that in the adoption of this resolution the Association had in mind a funeral, whether of rich or poor, attended by the conditions usually incident to the burial of the dead, in a cemetery or graveyard, in the presence of the family or friends or acquaintances of the deceased, and not the disposal made

of the bodies of the unfortunate paupers who die in charitable institutions and are carried to some medical institution or pauper graveyard without the presence of family or friends.

The judgment is affirmed.

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### **Adams Express Company v. Commonwealth.**

(Decided June 17, 1913.)

#### **Appeal from Whitley Circuit Court.**

1. **Intoxicating Liquors—Unlawful for Carrier to Deliver Intrastate Shipment in Local Option Territory.**—A carrier that brings into or delivers in local option territory intoxicating liquor as an intrastate shipment violates section 2569-a of the Kentucky Statutes, and may be punished thereunder.
2. **Intoxicating Liquors—When Unlawful for Carrier to Deliver as an Interstate Shipment in Local Option Territory.**—Since the enactment of the Congressional legislation known as the Webb-Kenyon law, a carrier that brings into and delivers in local option territory an interstate shipment of liquor may be punished under section 2569-a of the Kentucky Statutes, if the whiskey is intended by any person interested therein, to be received, possessed, sold or in any manner used in violation of the law in force at the place of delivery, but if the liquor was not intended to be so used, then the carrier cannot be punished.
3. **Intoxicating Liquors—Webb-Kenyon Law—Purpose and Effect of.**—The purpose of the Act of Congress known as the Webb-Kenyon Law was to withdraw from interstate shipments of liquor the protection theretofore afforded by the commerce clause of the Federal Constitution as to such shipments of whiskey as are intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the law at the place where it is delivered to the consignee. But if the liquor is not intended to be so received, possessed or used, then the Webb-Kenyon Law is not applicable to the transaction and the carrier will be protected by the commerce clause.
4. **Intoxicating Liquors—When Carrier of Interstate Shipment Protected by Commerce Clause of Federal Constitution.**—A carrier of interstate shipment of intoxicating liquor cannot be punished under any statute of the state unless the liquor was intended to be received or used in violation of some law of the State in force at the place of delivery.
5. **Intoxicating Liquors—Personal Use or Possession for Such Use Not Unlawful.**—It is not unlawful for a person to purchase for his own use, at places where it may be lawfully sold, intoxicating liquor, or have such liquor in his possession for such use, and a

- carrier who delivers to a person for his personal use an interstate shipment of liquor that was purchased at the place of shipment does not violate any law of this State.
6. **Intoxicating Liquors—Indictments Against Carrier for Delivering in Violation of Law.**—If the state law prohibits the thing the carrier has done, the indictment should charge in appropriate words a violation of the state law under which the prosecution is instituted, and then if the Webb-Kenyon Act is applicable to the transaction when treated as an interstate shipment, a conviction may be had upon sufficient evidence that the state law has been violated.
  7. **Intoxicating Liquors—Validity of Section 2569-a of Kentucky Statutes.**—This section is valid in every state of case when applied to intrastate shipments, but is invalid when applied to interstate shipments, unless the interstate shipment is intended to be received or used in violation of some law of the state.

LAWRENCE MAXWELL, JOSEPH S. GRAYDON and TYE & SILER for appellant.

JAMES GARNETT, Attorney General, JOSEPH B. SNYDER, Commonwealth's Attorney and J. C. BIRD, County Attorney for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Several separate indictments were returned in the Whitley Circuit Court against the Adams Express Company, a common carrier of goods, charging it with the offense of bringing into local option territory, in Whitley County, intoxicating liquor, and delivering the same in such territory to the persons named in the indictments as the consignees, one of these persons being Jim Prewitt. The indictments were found under section 2569a of the Kentucky Statutes, providing in part that:

"It shall be unlawful for any person or persons, individual or corporation, public or private carrier to bring into, transfer to other person or persons, corporations, carrier or agent, deliver or distribute, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited, or may be prohibited, whether by special act of the General Assembly, or by vote of the people under the local option law, any spirituous, vinous, malt or other intoxicating liquor, regardless of the name by which it may be called; and this act shall apply to all packages of such intoxicating liquors whether broken or unbroken.

"Provided individuals may bring into such district, upon their person or as their personal baggage, and for

their private use, such liquors in quantity not to exceed one gallon. *And provided*, the provisions of this act shall not apply to licensed physicians or druggists, to whom any public carrier may deliver such goods, in unbroken packages, in quantity not to exceed five gallons at any one time."

An agreed state of facts was made up between the Commonwealth and the Express Company, in which it was stipulated in substance that the intoxicating liquor that the Express Company, a common carrier, was indicted for carrying into and delivering in local option territory in this state, was carried by it in the usual course of business from a point in the state of Tennessee, at which place it was received by the carrier for shipment to the consignees. It was further stipulated that the liquor had theretofore been purchased by the consignees at the place in Tennessee from which it was shipped, and the purchase price had been paid by the consignees to the seller and consignor of the liquor at his place of business in Tennessee before the liquor was delivered to the carrier. It was further stipulated that the liquor was delivered by the carrier in local option territory to the persons named as consignees, who were the same persons who had purchased and paid the seller for the liquor in the state of Tennessee before it was delivered by the seller to the carrier for shipment to the consignees who had so purchased it; and that the shipments took place after the Act of Congress known as the Webb-Kenyon Law had gone into effect.

And it was further stipulated that "said liquors were intended by said consignees, respectively, for their personal use, and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them. That said consignees, being the persons named as witnesses in said indictments, were not at the times referred to in this stipulation either druggists or physicians."

Upon this agreed state of facts, the trial court, after refusing the request of the defendant to direct a verdict in its favor, instructed the jury in substance that at the times mentioned in the agreed state of facts Whitley County was what is commonly known as local option territory, and it was unlawful to sell, give or procure for or furnish to another any spirituous, vinous or malt liquors therein, and if they believed from the evidence that the defendant, Adams Express Company, as a com-



mon carrier brought into Whitley County and there delivered to Jim Prewitt, the person named in the indictment, any spirituous, vinous or malt liquors, they should find it guilty and fix its punishment at any fine not less than fifty dollars nor more than one hundred dollars, in their discretion according to the proof.

Under the evidence and instructions the jury found the defendant guilty and fixed its punishment in the case we have before us at a fine of one hundred dollars. From the judgment entered on the verdict of the jury, this appeal is prosecuted by the Adams Express Co., and a reversal of the judgment asked upon the following grounds: (a) that the Act of Congress known as the Webb-Kenyon Law is unconstitutional and void; (b) because the indictment is fatally defective in failing to charge that the liquors in question were intended to be possessed, sold or in some manner used by the consignee in violation of the laws of the state; (c) because section 2569a of the Kentucky Statutes, under which the indictment was found, is unconstitutional when attempted to be applied to interstate shipments of intoxicating liquor; (d) if the Webb-Kenyon law should be treated as a valid enactment, it is not applicable to the facts of this case, and this being so, the Express Company did not commit any offense punishable under the laws of this state.

At the outset it is agreed by counsel for the Commonwealth that, except for the enactment of the Congressional legislation known as the Webb-Kenyon Law, the Express Company, as a common carrier, could not be punished under section 2569a of our statute for carrying intoxicating liquor from a point in the state of Tennessee into territory in this state in which the sale of such liquor is prohibited by law and delivering it under the circumstances set out in the agreed state of facts, as this statute was expressly declared by the Supreme Court of the United States in *Louisville & Nashville Railroad Company v. Cook Brewing Company*, 223 U. S., 70, to be inoperative when attempted to be applied to interstate shipments of intoxicating liquor, although it was and is effective in its application to intrastate shipments of such liquor.

In the case mentioned, the Cook Brewing Company, an Indiana corporation engaged in business at Evansville, Indiana, tendered to the Louisville & Nashville Railroad Co., a common carrier of goods, a quantity of beer consigned to a point in the state of Kentucky in

which the local option law was in force. The railroad company having in mind section 2569a of the Kentucky Statutes, and not wishing to violate it, declined to carry the beer, and thereupon the Cook Brewing Company brought a suit to compel the railroad company to carry it. Holding that the carrier could not decline to receive, carry or deliver the beer, the Supreme Court, after setting out section 2569a of the statute, said:

“The legality of the attitude of the railroad company toward interstate shipments of intoxicating liquors to local option points in Kentucky must turn upon the validity of that legislation as applied to interstate shipments.

“By a long line of decisions, beginning even prior to *Leisy v. Hardin*, 135 U. S., 100, 34 L. Ed., 128, it has been indisputably determined:

“a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

“b. That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another;

“c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition. \* \* \*

“Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipment of such articles, it was most obviously never an effective enactment in so far as it undertook to regulate interstate shipments to dry points. Pending this very litigation, the Kentucky Court of Appeals, upon the authority of the line of cases above cited, reached the same conclusion. *Cincinnati, N. O. & T. P. R. Co. v. Commonwealth*, 126 Ky., 563.

“The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other states, any commodity which is an ordinary subject of interstate commerce and such transportation, could not be prohibited by any law of the state of such consignee, in as much as any such law would be an unlawful regula-

tion of interstate commerce, not authorized by the police power of the state. It is obvious, therefore, that in so far as the Kentucky Statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey, nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight."

This court, in *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Commonwealth*, 126 Ky., 563, and many other cases, has also ruled that section 2569a was ineffective to interfere with or prohibit interstate shipments of liquor. In view of these decisions, it is at once apparent, as conceded by the Commonwealth, that before the enactment of the Webb-Kenyon Law, the Express Company as a common carrier could not be punished for doing the acts described in the agreed state of facts.

It is, however, insisted for the Commonwealth that the Webb-Kenyon Law has withdrawn from interstate shipments of intoxicating liquors consigned to local option territory in this state the protection previously afforded to such shipments by the commerce clause of the Federal Constitution, and consequently section 2569a is now as much applicable to interstate as it is to intrastate shipments, and equally effective to prevent both. While counsel for the Express Company, as one of the arguments for reversal, take the position that the Webb-Kenyon Law is unconstitutional, and this being so, conditions in respect to interstate shipments of intoxicating liquor are the same now as they were before the passage of this Act, and the Express Company should therefore under the authority of the cases cited, have been acquitted of the charge against it.

Much is said in argument touching the validity of the Webb-Kenyon Law, but as we have reached the conclusion that the prosecution against the Express Company must fail because this legislation is not applicable under the agreed facts to the transaction for which the Express Company was indicted we are disinclined to consider the question of its constitutionality. The Supreme Court of the United States is the only tribunal having final jurisdiction to pass on the validity of Congressional legislation, and any opinion we might express would not carry with it the authority of a conclusive judgment.

We will, therefore, in disposing of the case, treat this legislation as valid and pass to the consideration of other grounds urged for reversal.

The Webb-Kenyon Law is entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," and provides "that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

As the indictment simply charged in apt terms an offense under section 2569a, and did not in any manner refer to the Webb-Kenyon Law, or aver that the liquor received by the consignee was intended by him, or by any person interested therein, to be received, possessed, sold or in any manner used in violation of the local option law in force at the place where it was delivered to the consignee, it is urged that the indictment is defective. The argument being that as the Webb-Kenyon Law is relied on as an essential element in if not the basis of the prosecution, the indictment should have charged that the liquor in question was intended by some person interested therein, naming him, to be either received, possessed, sold or in some manner used in violation of the laws of this state.

The objection to the indictment is not, in our opinion, well taken. It was not necessary to refer to the Webb-Kenyon Law or incorporate in the indictment any of its provisions. The offense, if any, committed by the carrier, consisted in violating section 2569a of our statute. The Webb-Kenyon Law does not undertake to create or describe any offense against the laws of the state. It merely withdraws the protection theretofore afforded by the laws of the United States to certain specified articles of commerce, and permits the state

laws to become operative as to these articles. It is not in any sense a penal statute, and under it alone no punishment can be inflicted. Therefore, when a state has enacted a statute making it unlawful for a common carrier to bring into local option territory intoxicating liquor, the state law furnishes the sole basis upon which a prosecution against the carrier may be instituted. If the state law prohibits the thing that the carrier has done, the indictment should charge in appropriate words a violation of the state law under which the prosecution is instituted, and then if the Webb-Kenyon Act is applicable to the transaction when treated as an interstate shipment, a conviction may be had upon sufficient evidence that the state law has been violated.

Another ground of reversal relied on is that section 2569a was unconstitutional when enacted as applied to interstate shipments of intoxicating liquor, and this being so, life or validity was not imparted to this statute by the enactment of the Webb-Kenyon Law. The error in this argument consists in the assumption that section 2569a has been declared unconstitutional. It will be readily conceded that if any time prior to the enactment of the Webb-Kenyon Law section 2569a had been declared unconstitutional either by this court or the Supreme Court of the United States, the enactment of the Webb-Kenyon Law could not restore validity to it. But neither this court nor the Supreme Court of the United States has ever held that section 2569a was unconstitutional. On the contrary, we have in several cases upheld its validity. *Adams Express Co. v. Com.*, 129 Ky., 420; *Com. v. Southern Railway Company in Kentucky*, 141 Ky., 353; *Commonwealth v. L. & N. Railroad Co.*, 140 Ky., 21.

In the case of *L. & N. Railroad v. The Cook Brewing Co.*, the Supreme Court of the United States did not declare this statute unconstitutional, but merely held that it was inoperative when attempted to be applied to interstate shipments, ruling that these shipments were protected by the commerce clause of the Federal Constitution, and, therefore, could not be interfered with or obstructed by state legislation. The purpose, and the only purpose, of the Webb-Kenyon Law, as we have heretofore stated, was to withdraw from interstate shipments of intoxicating liquor the complete protection it had under the principle announced in the *Cook Brewing Co.* case, as well as in many other cases, and assuming as we

do that the Webb-Kenyon Law is valid legislation, there can be no doubt that section 2569a is operative when applied to intoxicating liquor that is shipped as an interstate transaction to a consignee living in local option territory in this state to be received, possessed, sold or in any manner used in violation of any law of this state. If, however, the liquor is not intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the laws of this state, then, notwithstanding the Webb-Kenyon Law, its carriage and delivery is as fully protected by the commerce clause of the Federal Constitution as it was before the enactment of the Webb-Kenyon Law.

This law specifies with particularity the character of transaction designed to be taken from under the protection of the commerce clause, and manifestly it was not intended by it to remove this protection from any other character of shipment. In other words, if the transaction comes within the scope of the Webb-Kenyon Law, the commerce clause of the Federal Constitution affords no protection from prosecution instituted under the laws of the state, but if the transaction does not come within the scope of this law, then the commerce clause of the Federal Constitution is equally as effective in its protection of carriers as it was before the enactment of this law.

Before this law was enacted the carrier was under a duty to and might be compelled to carry as an interstate shipment liquor and deliver the same in local option territory without regard to the use to which the consignee intended to put it. In respect to interstate shipments, the individual who purchased it to use in violation of law and the citizen who procured it for his personal use occupied the same attitude. The commerce clause of the Federal Constitution afforded to the carrier in its dealings with each precisely the same measure of protection, and this was true although the carrier might have notice that the liquor was intended by the consignee to be used in violation of the laws of the state.

But under the operation of the Webb-Kenyon Law the boot-legger and the citizen who purchase liquor in other states and have it delivered in this state by a carrier, one for unlawful, the other for lawful purposes, do not occupy the same position, nor is the duty and immunity of the carrier the same in respect to each. The commerce clause of the Federal Constitution does not

now afford to the carrier the complete protection it formerly did. The carrier must now, if it wishes to avoid being prosecuted, take notice of the use to which it is intended to put the liquor, and if this use will violate the law of the state at the place of delivery, the carrier may refuse to receive the shipment, or having received it, may refuse to deliver it.

In short the carrier, in bringing into and delivering intoxicating liquor at places where its sale is forbidden, or at places where the local option law is in force, does so at its peril, and takes the risk of being prosecuted and punished under section 2569a, if the liquor is intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the laws of the state. This, however, is not to be construed into an expression of opinion that in prosecutions under section 2569a the burden of proof is on the carrier to show that the consignee intended to use the liquor in a lawful manner, as there is no issue in this record as to the burden of proof or the quantity of evidence necessary to sustain a judgment of conviction.

This brings us to consider more in detail the question whether the transaction for which the Express Company was punished was prohibited by the Webb-Kenyon Law, and its solution depends, as we have indicated, on the purpose for which the liquor was intended to be received, possessed and used. Looking again to the agreed state of facts we find that "said liquors were intended by said consignees, respectively, for their personal use, and were not intended by them to be sold contrary to law, and were not so sold by them."

This being the purpose for which the liquor was intended to be received, possessed and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. *Calhoun v. Commonwealth*, 154 Ky., 70; *Martin v. Commonwealth*, 153 Ky., 784. As said in *Commonwealth v. Campbell*, 133 Ky., 50.

"The history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using

liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; and we are of opinion that it never has been within the competency of the Legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution. The Bill of Rights, which declared that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freeman exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. \* \* \* Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."

We may also here observe that the history of the Webb-Kenyon Law, the causes that led to its enactment and the evils it was intended to remedy, taken in connection with the carefully chosen words of the Act, show that the object was to aid the states in suppressing the illegal traffic in intoxicating liquors that they had been much hindered in doing by the protection afforded violators of the law by the commerce clause of the Federal Constitution, and that it was not meant by this legislation to in any manner abridge the personal liberty of the citizen in the right to personally use liquor, or the right to have it in his possession for such use.

It is, however, insisted for the Commonwealth that, although the consignee of the whiskey in this case may have received it for a lawful purpose, it was nevertheless a violation of law for the carrier to deliver it to him. The argument in this behalf being that as section 2569a makes it unlawful for a carrier to bring into or deliver in local option territory any intoxicating liquors, subject to the exception mentioned in the section, the fact that the person to whom the liquor is delivered intends to possess and use it lawfully, does not excuse the carrier



from doing a thing that is forbidden by the law of the state as expressed in this section.

This argument being rested on the proposition that as it would be unlawful for a carrier, as an intrastate transaction, to deliver this liquor, the Webb-Kenyon Law makes the delivery of it by the carrier unlawful, although it be an interstate transaction, as both interstate and intrastate shipments are now on the same footing and are to be treated precisely alike. In short, it is said that in every case in which it would be unlawful for a common carrier to receive for shipment liquor at a point in this state where it might be sold, and carry and deliver it to the consignee at a point in this state where its sale was prohibited, it would also be unlawful for a common carrier to receive it for shipment at a point outside of the state and deliver it to the consignee at a point in this state where the sale of liquor was prohibited.

We do not, however, agree with counsel for the Commonwealth in this broad statement of the effect of the Webb-Kenyon Law. There is the same distinction now that there was before the enactment of this law between intrastate and interstate shipments of liquor, except when the interstate shipments come within the prohibition of the Webb-Kenyon Law. It does not follow that because it would be unlawful for a carrier to deliver liquor as an intrastate transaction that it would also be unlawful for it to deliver, under like circumstances, liquor as an interstate transaction.

For example, we held in *Adams Express Co. v. Commonwealth*, 129 Ky., 420, that under section 2569a a common carrier was forbidden to carry liquor from a point in this state at which it might be lawfully purchased to a point in the state where the local option law was in force and there deliver it to the consignee; and the validity of this statute as applied to intrastate transactions was recognized by the Supreme Court of the United States in the *Cook Brewing Co.* case. But we have also held in *C., N. O. & T. P. Ry. Co. v. Commonwealth*, 126 Ky., 563, and many other cases, as did the Supreme Court in the *Cook Brewing Co.* case, that section 2569a was inoperative when attempted to be applied, under like circumstances, to intrastate transactions.

It, therefore, appears that the issue in this case really comes down to this, was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold or in any manner used in vio-

lation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the Constitution and laws of the state, and the opinions of this court, that it was not.

This being true the aid of the Webb-Kenyon Law cannot be invoked to secure the punishment of the carrier as it does not prohibit a common carrier from receiving, carrying and delivering, as an interstate transaction, intoxicating liquor to the consignee when it is not intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the laws of this state, or withhold from such a transaction the protection afforded by the commerce clause of the Federal Constitution. As to this character of transaction the Webb-Kenyon Law has no application, and having no application, the law, as it existed before the enactment of this legislation, is in force, and being in force, the carrier cannot be punished for receiving, carrying and delivering, as an interstate transaction, intoxicating liquor in local option territory to a consignee who purchased it at a point in another state, and when it is not intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the law of this state.

If, however, the liquor is intended to be received, possessed, sold or in any manner used in violation of the law of this state, then the Webb-Kenyon Act applies, although the transaction may be an interstate one, and the carrier is not protected from the punishment imposed by section 2569a of the statute by the commerce clause of the Federal Constitution under which it would have been exempt from punishment before the enactment of the Webb-Kenyon Law, which was intended to and does withdraw from the character of shipments therein mentioned the protection theretofore afforded by the commerce clause.

The result of our views on the whole case is, that whether a carrier of an interstate shipment of liquor subjects itself to punishment or not depends on the use to which the person to whom it delivers liquor intends to put it. If this use violates a law of the state, then the carrier may be punished; if it does not, the carrier has not committed any offense.

A further result is that the guilt or innocence of the carrier becomes in each case a question of fact to be de-

terminated as are other disputed issues of fact under our law.

For the reasons indicated, the trial court should have directed a verdict for the defendant.

Wherefore, the judgment is reversed, with directions to proceed in conformity with this opinion.

Whole court sitting except Judge Nunn, absent on account of sickness.

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## Heydrick v. Dickey, et al.

(Decided June 17, 1913.)

### Appeal from Perry Circuit Court.

**Specific Performance—Land—Contract of Sale—Option—Unilateral Contract—Time.**—A contract by which the parties of the first part sell and agree to convey certain land in consideration of a cash payment of \$100 on the first payment of \$5 per acre, the balance to be paid twelve months from date, and when the amount of land is ascertained and conveyance made, and whereunder the grantee, at any time, has the right to surrender the agreement upon the payment of the sum of \$10 and the forfeiture of the \$100 cash payment, and be released from all liability under the agreement, is unilateral, and more nearly akin to an option than an executory contract of sale, since the grantee has the right, at any time, to elect whether or not he will take the land. Under such a contract time is of the essence, and where the time for performance is not definitely fixed, the grantee must exercise his right of election under the contract and demand performance within a reasonable time; and where neither demand is made nor suit for specific performance brought until after the lapse of eight years from the time the contract is executed, specific performance will not be decreed.

HARKINS & HARKINS and HOGG & JOHNSON for appellant.

BYRD & NICKELL, BAILEY P. WOOTTEN and JESSE MORGAN for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

On July 10, 1903, J. J. Dickey and Ida P. Dickey, who were the owners of a certain tract of land in Pike County, Kentucky, executed to D. Y. Combs, an instrument in writing which is as follows:

"THIS AGREEMENT made and entered into this 10th day of July, 1903, by and between J. J. Dickey and his wife, Ida P., of Mason County, and State of Kentucky, party of the first part and hereinafter called the 'Grantor,' which expression shall include his heirs and assigns where the context so requires or admits, and D. Y. Combs, as part of the second part, and hereinafter called the 'Grantee,' which expression shall include his successors and assigns where the context so requires or admits.

"WITNESSETH: That for and in consideration of \$100 in hand paid, receipt of which is hereby acknowledged, and as first payment upon the sum of \$5 per acre for the tract of land hereinafter described, to be paid in twelve months from the date hereof, and when the amount thereof is ascertained and conveyed as hereinafter stated, the 'Grantor' has sold and hereby agrees to convey to the 'Grantee' the following described tract of land situated on the waters of Kentucky River, in Perry County, State of Kentucky, bounded and described as follows, to-wit:

Lying & being on the head of Scuddy Creek of Cars fork of the North fork of the Kentucky River and this being the same 2 tracts of land conveyed by J. B. Hollin and wife to J. J. Dickey, bearing date of February 22, 1901, record in deed book N. page 549 and 50 of Perry County. One tract containing 130 acres & the other tract containing 70 acres more or less.

Before payment of the said deferred consideration can be demanded by the 'Grantor' as a matter of strict right, the number of acres in said boundary is to be determined by actual survey made by, and under the direction of, a competent civil engineer, at the expense of the 'Grantor,' and the 'Grantor' shall furnish a complete abstract showing title in him, and thereupon convey or tender to the 'Grantee' deed containing covenants of general warranty, and the further covenants that he is seized in fee simple of said land, in actual possession thereof, and has good right and full power and authority to sell and convey the same, and that the 'Grantee' shall and may have, hold and enjoy the said property free from eviction or disturbance by title paramount to that conveyed by the said deed, and that the land hereby sold and thereby to be conveyed, is free from all liens or encumbrances, concerning which covenant it is hereby expressly declared that representation as to the aforesaid

terms of said warranty to be made are declared an essential condition and moving consideration of this agreement. Right of way upon and over said land for the purpose of surveying and prospecting aforesaid land, is granted to the aforesaid 'Grantee,' his successors and assigns, or persons acting under his authority.

It is further agreed by and between the parties hereto that the 'Grantee' has the right at any time to surrender this agreement upon the payment of the sum of \$10, which amount the 'Grantor' hereby agrees to accept as a full consideration for the surrender of this agreement, and the 'Grantee' is thereupon released from all liability named in this agreement, and hereby forfeits the sum of \$100 this day advanced on this contract.

IN TESTIMONY WHEREOF the said parties hereto have hereunto set their hands and seals, the day and year first above written."

The instrument was acknowledged by J. J. Dickey and wife on July 10, 1903, and delivered to D. Y. Combs. On July 23, 1903, D. Y. Combs, by his written endorsement thereon, and for value received, assigned and transferred the agreement to J. C. Heydrick, his heirs and assigns. The assignment was acknowledged before the county clerk of Pike County. On July 24, 1903, the instrument, including the assignment, was recorded in the office of the clerk of the Pike County Court.

Plaintiff, J. C. Heydrick, brought this action against defendants, J. J. Dickey and Ida P. Dickey for a specific performance. The petition alleges that plaintiff had called upon defendants to deliver to him an abstract of title and to convey to him the property in question, and had offered to pay them therefor the full amount of the purchase price in cash, but that the defendants had failed and refused to comply with the contract. Plaintiff also alleges that he was able, ready and willing to pay the purchase price, and asked that defendants be adjudged to make conveyance to him in accordance with the contract, and upon their failure to do so, that the master commissioner make conveyance. The defendants demurred to the petition, and at the same time filed an answer, counterclaim and cross-petition. Thereafter, plaintiff filed an amended petition, stating that he had caused the land to be surveyed, and setting out by metes and bounds the two tracts embraced therein, the first tract containing 56 62-100 acres, the second tract 138 51-100 acres. To the amended petition R. M. McIntire,

N. W. Brashear and others were made parties defendant, it being alleged that they were asserting some kind of claim to the land in question. A demurrer was sustained to the petition as amended and the petition dismissed Plaintiff appeals.

It will be observed that the price of the land in question was fixed at \$5 per acre, and that the contract recites the receipt of \$100 in hand paid, and provides that the number of acres in the boundary is to be determined by actual survey made by and under the directions of a competent civil engineer at the expense of the grantor, and that right of way upon and over said lands for the purpose of surveying and prospecting is granted to the latter, his successors and assigns or persons acting under his authority. This provision evidently contemplates that the surveying was to be done by the grantee's agents, though at the expense of the grantor. The contract also provides that the grantee has the right any time to surrender the agreement upon the payment of the sum of \$10, which amount the grantor agrees to accept as a full consideration for the surrender. Upon the payment of the \$10 the grantee is relieved from all liability, but forfeits the sum of \$100 advanced on the contract. The contract also provides that the consideration of \$5 per acre should be paid in twelve months from the date of the agreement, and when the amount of land was ascertained and conveyed as provided by the agreement.

Here, then, we have a contract by which the grantors sell and bind themselves to convey the property in question without any corresponding obligation on the part of the grantee to take and pay for the land. Had the grantors tendered him a perfect title and otherwise complied with the provisions of the contract, he could, by surrendering the \$100 cash payment and paying the further sum of \$10, have escaped all liability under the contract. In that event they could not have obtained specific performance, for the right to be relieved of all liability in the manner indicated was one which, by the very terms of the contract, he could exercise "at any time." In other words, the grantee's obligation under the contract is a matter of election, and he may take the land or not, just as he sees fit. Being enforceable against the grantors by the grantee, but unenforceable against the grantee if he so elect, the agreement is unilateral, and is rather in the nature of an option than an executory contract of sale. We therefore conclude that

time is of the essence of the contract. *Stembridge v. Stembridge's Admr.*, 87 Ky., 91; *Litz, &c. v. Goosling, &c.*, 93 Ky., 185. The time for performance not being definitely fixed by the contract, the grantee should have exercised his right under the contract, and demanded performance within a reasonable time. While the petition does allege that plaintiff demanded that the grantors furnish him with abstract, deed, etc., yet under the rule that a pleading is construed most strongly against the pleader, we take it that the demand was made just prior to the time that suit was brought. That being true, there was neither demand nor suit for specific performance until after the lapse of eight years from the time the contract was executed. Having not only failed to demand performance within a reasonable time, but having postponed his demand and suit for such an unreasonable time as to justify the inference that the contract was abandoned by both parties, specific performance should not be decreed. We therefore conclude that the trial court properly sustained the demurrer to the petition as amended.

Judgment affirmed.

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### Gover, et al. v. Newton, et al.

(Decided June 17, 1913.)

#### Appeal from Pulaski Circuit Court.

1. **Local Option Election—County—Petition—Sufficiency.**—When a local option election is sought in an entire county, the petition should be signed by a number of voters equal to 25 per cent of the votes cast in each of the precincts at the last preceding general election.
2. **Local Option Election—Precinct—Transfer of Territory and Population—Petition—Requisite Number of Signers.**—Where after the next preceding general election a new county is formed and a portion of the territory and population in a precinct in an old county is transferred to the new county, it is only necessary that the petition asking for a local option election in the old county be signed by a number of voters in the precinct equal to 25 per cent of those who voted at the next preceding general election, and still remain in the precinct.
3. **Local Option Election—Petition—Right of Petitioners to Withdraw Their Names.**—Persons who sign a petition for a local option election may withdraw their names from the petition at any time before it is acted on by the county court.

4. **Local Option Election—Submission of Case—Subsequent Hearing of Evidence—Right of Petitioner to Withdraw.**—Where on petition for the calling of a local option election the case is submitted, the hearing of evidence thereafter on a disputed question of fact renders ineffective the order of submission, and does not deprive a petitioner of the right to withdraw his name from the petition before it is finally acted on.

**ELBERT WESLEY, WESLEY & BROWN and DENTON & FLIPPIN** for appellants.

**O. H. WADDLE & SONS and W. M. CATRON** for appellees.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.**

This appeal involves the validity of a local option election held in the county of Pulaski on December 10, 1912. After the election Sylvester Newton and others filed a contest. The contest board held the election valid. On appeal to the circuit court the election was adjudged to be invalid. From that judgment the contestees appeal.

The facts are as follows: On September 14, 1912, there was filed with the county court a written petition asking for an election to take the sense of the legal voters of Pulaski County on the proposition whether or not spirituous, vinous or malt liquors should be sold, loaned or bartered in such county, and that said law and prohibition apply to druggists. Application was made by written petition, signed by legal voters from each of the precincts in the county equal to 25 per cent of the votes cast in each of said precincts at the last preceding general election, which was held in November, 1911. On the calling of the case on the docket for hearing on September 16, 1912, ten of the signers in Beaver precinct No. 33 produced and filed in open court a written request to strike their names from the petition, and moved the court that this be done. At the same time the attorneys representing the "wets" moved the court to dismiss the petition asking for the election on the ground that there were only 47 votes cast at the preceding general election in Beaver precinct, and as only 20 legal voters from that precinct had signed the petition and ten had requested the withdrawal of their names, the number of signers remaining on the petition did not equal 25 per cent of the votes cast in that precinct at the next preceding general election. The attention of the court was then called to the fact that since the November election, 1911, the county of McCreary



had been created, and that the line separating that county from Pulaski County passed through Beaver precinct, thus transferring to McCreary County about one-half the territory and about one-half the population of Beaver precinct. Without passing on the question of the withdrawal or the striking of the names of the parties from the petition, the court adjourned in order that it might be advised what number of signers was necessary in order to constitute 25 per cent of the legal voters in Beaver precinct, and ordered that the case be closed on the facts as they then existed and that it be submitted for judgment. On September 20, 1912, the court re-convened, pursuant to adjournment, for the purpose of rendering judgment. The court entered an order appointing Wesley Collyer and Ben Branchcomb special commissioners to go to Beaver precinct for the purpose of ascertaining and reporting to the court the number of voters in said precinct who cast their votes at the last regular election in said precinct, and who, at the time of casting their votes, resided in that portion of the precinct which is now a part of Pulaski County. Branchcomb having declined to act as such commissioner, Huston Howard was appointed in his place. Howard also refused to act, and on September 24, 1912, Wesley Collyer presented and filed his report as such commissioner, fixing the number of voters who voted at the next preceding general election, and who, after the creation of McCreary County, still lived in Pulaski County in Beaver precinct, at 29. The contestants objected to the report of the commissioner being received, and asked that there be stricken from the petition the names of those who had asked that this be done, and that the petition asking for an election be dismissed. The court declined to pass on any of these questions, but continued the case until September 25th. When the case was called on that day, a request, signed by three of the original petitioners, was presented, asking that their names be stricken from the petition asking the election. The court refused to strike these names from the petition, but did enter an order striking from the petition the names of the ten petitioners who had previously asked that this be done. He then entered an order calling the election.

While a different rule prevails in cities and towns, it is well settled that when the election is proposed to be held in territory comprising precincts, the petition should be signed by a number of voters equal to 25 per cent of

the votes cast in each precinct at the last preceding general election. Kentucky Statutes, Sec. 2554; *Nall v. Tinsley*, 107 Ky., 441. The validity of the election in question, therefore, depends on whether or not the petition in question was signed by a number of voters in Beaver precinct equal to 25 per cent of the votes cast in that precinct at the next preceding general election. After the general election in November, 1911, the county of McCreary was created. A portion of Beaver precinct was transferred to that county. There remained in that precinct only about half of its former territory and population. The statute providing for the calling of such an election makes no provision for a case of this kind. It was never contemplated that where the population and territory of a precinct were transferred to another county there should still be required a number of signers equal to 25 per cent of the votes cast at the next preceding general election which occurred before such transfer. We therefore conclude that the county court properly held that it was only necessary to have the petition signed by a number equal to 25 per cent of the voters who voted at the November election, 1911, and who still lived in that part of Beaver precinct left remaining in Pulaski County. As the petition was originally signed by 20 voters, and the names of ten of these were stricken from the petition, there remained only ten signers. Even if we concede that the commissioner's report was correct, the number of voters who voted at the November election, 1911, and who still resided in Beaver precinct was 29. Had the names of the three additional petitioners who asked that their names be stricken from the petition been stricken therefrom, there would have remained only seven. Seven is not 25 per cent of 29. It follows that the validity of the election turns on the right of these petitioners to withdraw their names, and the propriety of the court's action in refusing to permit them to do so. We have, in a number of cases, refused to follow the rule announced by the Supreme Court of Arkansas in the case of *Colvin v. French*, 75 Ark., 154, and have held that one who signs a petition for a local option election had a right to withdraw his name at any time before the petition is acted on. *O'Neal v. Minary*, 125 Ky., 571; *Davis v. Henderson*, 127 Ky., 13; *Barton v. Edwards*, Judge, et al., 143 Ky., 713. It is insisted, however, that this rule does not apply under the facts of this case, because the case was actually submitted for judgment at the time the withdrawal of the three names was asked. While it is true

that an order was made submitting the case, it also appears that after it is claimed the case was submitted, the court appointed a commissioner, who heard evidence on the number of voters who voted at the November election, 1911, and still remained residents of Beaver precinct after the formation of McCreary County. A case cannot be said to be submitted when evidence is thereafter heard, unless consented to by the parties. In this case there was no consent. The necessary effect of hearing evidence on the question in dispute was to annul the order of submission. That being true, it follows that the three petitioners had the right to withdraw before the petition was acted on.

Judgment affirmed.

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### Roberts v. Cardwell.

(Decided June 17, 1913.)

#### Appeal from Breathitt Circuit Court.

1. *Lis Pendens*—Vendor and Purchaser.—A *lis pendens* purchaser from one who is a party to the action, and who has been divested of title by the judgment entered, acquires no title, and where his vendor, for a period of nearly twenty years, contests the action without raising the plea of fraud, the *lis pendens* purchaser is precluded by the judgment, and cannot attack the judgment and the subsequent proceedings on the ground of fraud.
2. *Lis Pendens*—Laches—Adverse Possession.—Though a purchaser *pendente lite* is bound by any judgment that may be rendered against the person from whom he purchased, yet where there is an unreasonable delay in the prosecution of the suit, a party may lose the benefit of the *lis pendens* and deprive himself of any remedy against a bona fide purchaser, and such purchaser may rely upon the statute of limitations.

G. W. FLEENOR and MARTIN T. KELLY for appellant.

MCGUIRE & MCGUIRE, ADAMS & HOLLIDAY and HAZELRIGG & HAZELRIGG for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

In October, 1886, William Smith died intestate in Breathitt County, Kentucky, leaving surviving him his widow, Nancy, and one son, George Smith. In July,

1887, John W. Cardwell, a creditor of the decedent, brought suit in the Breathitt Circuit Court to settle his estate. In this action he alleged that the decedent did not leave sufficient personal property to pay his debts, and he asked that a certain described piece of real estate be sold for that purpose. In 1889 Charles J. Little filed his petition in the action asking that he be made a party and that his petition be taken as his answer and cross petition. In his petition he alleged that in July, 1887, more than six months after the death of William Smith, one Harry Baldwin, for a good and valuable consideration paid to Nancy Smith and George Smith, purchased from them the tract of land described in the petition, and on that day the same was conveyed to plaintiff by deed. In August, 1888, plaintiff sold and conveyed the land to him, and in 1889 Nancy and George Smith conveyed it to him. Immediately after the purchase he took possession of the land and was in possession at the time he filed his petition. He prayed that the petition be dismissed and that he be adjudged the owner of the land. In 1888, and prior to the filing of the petition by Little, an order was entered referring the case to the master commissioner to report claims. The commissioner filed two reports during that year. In his last report he stated that there were no funds in the hands of the administrator, and that it was necessary to sell the real estate of the decedent to pay his debts. In 1889 the reports of claims, excepting two small items, were confirmed. In 1891 the action was submitted and a judgment entered directing the commissioner to sell the land mentioned in the petition for the purpose of paying the debts due by the estate. In 1894 the commissioner filed his report of sale, reciting that the real estate was sold to W. T. Hogg for \$418. On the 13th day of September, 1892, it appearing to the satisfaction of the court that the papers in the case were lost, the case was referred to the master commissioner to supply same. On March 17, 1894, a similar order was again entered. In March, 1896, Cardwell made a motion to confirm the commissioner's report of sale. In 1896 C. J. Little filed his petition to be made a party defendant, and plaintiff excepted. On November 17, 1898, Emily Crane, executrix of W. T. Hogg, assigned the bid of W. T. Hogg to J. W. Cardwell. On November 23, 1899, plaintiff made a motion to have the commissioner's report of sale confirmed. On June 21,

1900, the case was referred to the master commissioner for the purpose of supplying the lost papers. On November 9, 1900, the commissioner filed his report supplying certain pleadings and papers in the case. On November 2, 1900, C. J. Little filed a substituted petition and asked that it be taken for the original petition and filed by him and be treated as his answer to plaintiff's petition. In June, 1909, Little filed exceptions to the commissioner's report of sale. Thereafter, at the same term, the case was submitted on Cardwell's motion to have the sale confirmed and a deed made, and upon the exceptions filed by Little to the report of sale. The judgment recited that the court "finds that said Little's petition to be made a party was filed on the 4th day of January, 1899, setting up claim to the land described in the petition, and that the judgment ordering said sale was made at the September term, 1891. He further finds that the matters and things claimed by said Little were settled by said judgment." The court further overruled Little's exceptions to the commissioner's report of sale and entered an order confirming the sale and directing a deed to be made to the assignee of the purchaser. Thereupon C. J. Little prosecuted an appeal to this court, where it was held that the judgment of sale of 1891 was a final, adverse and appealable determination of the claim of title to the land asserted in his pleading. It was further held that as Little had not appealed from that judgment in time, his appeal should be dismissed. *Little v. Cardwell, et al.*, 122 S. W., 799.

On June 26, 1911, plaintiff, J. W. Cardwell, alleging that he was the owner of a certain described tract of land and in possession thereof, brought this action against S. S. Roberts to enjoin him from trespassing thereon. Roberts filed an answer denying plaintiff's title to the land and pleading title in himself by adverse possession. Thereupon plaintiff filed a reply setting up all the proceedings in the action of John W. Cardwell, v. George W. Smith, Administrator, &c. He further pleaded that C. J. Little was a *pendente lite* purchaser of the land sold in that action, and that the defendant, Roberts, claimed title under and by virtue of a purchase from said Little during the pendency of the action; that both Little and the defendant, Roberts, purchased with a knowledge of the pendency of the action; that Little was a party to that action and Rob-

erts was a privy of the said Little, and that both were bound by the judgment, orders and decrees entered in that suit, and estopped from setting up any claim to the land to the contrary. The reply also alleges that in the year 19——, a writ of possession was placed in the hands of the sheriff of Breathitt County to be executed, and while the same was alive and in full force and effect said writ was duly executed upon defendant, and he was dispossessed of said property, and plaintiff was put in possession thereof by said sheriff. Thereupon defendant, Roberts, filed a rejoinder, in which he denied the allegations of the reply, including many allegations shown by the record in the case of J. W. Cardwell v. George Smith, Admr., &c. In another paragraph he alleged facts going to show that the judgment of 1891 was fraudulently obtained, and that all of the further orders and judgments entered thereafter were also obtained by the fraud of the plaintiff, Cardwell. He further pleaded laches on the part of said Cardwell in the prosecution of this suit, and set up his claim to the land by adverse possession.

It will be observed that the action pleaded in bar of defendant's right of recovery was brought prior to the enactment of the act of 1896, requiring the filing of a *lis pendens* notice in the office of the county clerk. The question before us is, therefore, controlled by the law in force prior to the enactment of that statute. The doctrine of *lis pendens* as to persons and property within its operation is that the court having jurisdiction of the suit or action is entitled to proceed to the final exercise of that jurisdiction, and that it is beyond the power of any of the parties to the action to prevent its doing so by any transfer or other act made or done after the service of the writ or the happening of such other act as may be necessary to the commencement of *lis pendens*. If any of the parties, after the *lis pendens* has become operative, attempts any transfer of the subject matter of the litigation, or to create any encumbrance or charge against it, or to enter into any contract affecting it, or to deliver possession of it to another, the action or suit may proceed without taking any notice whatever of such transfer, encumbrance or change in possession, and the final judgment or decree, when entered, may be carried into effect notwithstanding the attempted dealing with the subject matter thereof. *Moons v. Crowder*, 72 Ala., 79; *Norton v. Birge*,

35 Conn., 250; Kellar v. Stanley, 86 Ky., 24; Copenheaver v. Huffaker, &c., 6 B. Mon., 18. The effect of the *lis pendens* is to keep the subject matter of the litigation within the control of the court, and to render the parties powerless to place it beyond the reach of the final judgment. One acquiring an interest *pendente lite* is sometimes, on his application, permitted to appear in the action and defend or prosecute in the place of the person to whose interest he has succeeded. The court is not, however, bound to permit him to do so, in the absence of a statute conferring upon him this right. Whether, however, he appears in the cause or not, and whether he has any actual notice of its pendency or not, the judgment, when rendered, must be given the same effect as if he had not acquired his interest or as if he had been a party before the court from the commencement of the proceeding. His interests are absolutely concluded by the final determination of the suit. Galbreath v. Estes, 38 Ark., 599; Jackson v. Andrews, 7 Wend., 152; Jones v. McNarrin, 68 Me., 334, 28 Am. St. Rep., 66; Kellar v. Stanley, *supra*. However, the prosecution of the suit with reasonable diligence is essential to the continued operation of the law of *lis pendens*, and the benefit of a *lis pendens* may be lost by an unusual or unreasonable delay which is not satisfactorily explained or accounted for. Petrie v. Bell, 2 Bush, 58; Gossom v. Donaldson, 18 B. Mon., 230, 68 Am. Dec., 723; Hawes v. Orr, 10 Bush, 431; Wallace v. Marquett, 88 Ky., 130.

If, on the other hand, a judgment or decree is entered directing a sale of property, such a judgment or decree is binding upon parties who may thereafter purchase from either of the parties to the suit, and no transfer made by either after the judgment or decree has been pronounced can prevent the enforcement thereof. Jackson v. Warren, 32 Ill., 331; McCauley v. Rogers, 104 Ill., 578; Pitman v. Wakefield, 90 Ky., 171; Biddle v. Tomlinson, 115 Pa. St., 299. In the case before us the defendant, Roberts, purchased from Little after it was finally adjudged that Little had no title to the land. After the sale under that judgment Little filed exceptions to the sale and objected to its confirmation. For a number of years he continued to fight the suit by filing amended and substituted petitions, and by renewing his exceptions to the report of sale. While Roberts was not a party to the action, his vendor, Little, was

and the latter continued to defend the action through a long period of time. Roberts' purchase from Little was subject to any orders that might thereafter be entered by the court. If there was fraud in the judgment of 1891, or in the subsequent proceedings Little should have brought this to the attention of the court within a reasonable time after the alleged fraud was committed. Little would not be permitted to fight the case and make every possible defense for a period of nearly twenty years, without raising the question of fraud, and then contend that all the proceedings were obtained by fraud. That being true Roberts, his vendee, will not be permitted to make a defense in this action which Little, his vendor, should have made in the action adjudging that he had no title to the land.

There are but two phases of the question that remain to be discussed. Manifestly, if Little, under whom Roberts claims, had remained in possession of the land during the long pendency of the action of Cardwell v. Smith, &c., he could not have relied upon the statute of limitations. Whether or not Roberts may rely upon the statute of limitations depends upon whether or not the suit was prosecuted with due diligence after the judgment of 1891. Roberts cannot rely upon the adverse possession of Little, because Little's possession was not adverse. If, however, considering the circumstances of the case, there was an unreasonable delay in the prosecution of the suit, then Roberts, who acquired the title in 1894, and entered into possession of the land, may rely upon the statute of limitations and defeat plaintiff's recovery. In the case of Petrie v. Bell, 2 Bush, 58, it was held that an unexplained delay of two years was sufficient to defeat the benefit of a *lis pendens*. In the case referred to the sale was made in 1891, while the commissioner's report of sale was filed in July, 1894. Thereafter there were numerous delays. Defendant, Roberts, alleges laches in the prosecution of the suit. We are unable to say from the record as now before us whether there was laches in the prosecution of that suit or not. It appears that the papers were lost. The delay may have been caused by the loss of the papers. It is sufficient to say that the rejoinder makes out a *prima facie* case of laches, and on this account we withhold any opinion until the facts and circumstances are all before us. If there was laches in the prosecution of that suit, and defendant was in the



adverse possession of the land for a period of fifteen years prior to being dispossessed, then he is entitled to recover upon this ground and no other. For these reasons the demurrer to the rejoinder should have been overruled.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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**Paul C. Hager, Clerk, v. Robinson.**

**Paul C. Hager, Clerk, v. Turner, et al.**

(Decided June 20, 1913.)

Appeals from Johnson Circuit Court.

1. Elections—Primary Elections—Not an Election Within Meaning of Constitution—Legislature may Enact Law Requiring Nominations to be Made by and Prescribe Manner and Conduct of.—As a primary election is not an election with the meaning of the Constitution, and there is no provision of that instrument which prohibits the Legislature from enacting a law requiring party nominations to be made by means of primary elections, it necessarily follows that it was competent for it to provide by law that nominations of party candidates for office shall be made in no other way; to prescribe the time of holding and manner of conducting the primary elections by which such nominations are to be made; and also to impose such reasonable conditions and tests as to party membership or affiliation, as shall entitle those seeking party nominations to get their names upon their party's ballot as candidates.
2. Elections—Primary Elections—Act Provided For—Constitutionality of.—The Act entitled "An Act to provide for the nomination of candidates by political parties at primary elections and for placing the names of candidates on the ballots to be voted for at the general election, and prescribing penalties for the violation thereof;" approved March 5, 1912, is not in any of the particulars indicated in these cases, unconstitutional.
3. Elections—Primary Elections—Act Providing For—Constitutionality of.—The provision in section 6 of the act, which requires the petition of one seeking to have his name placed on his party's ballot as a candidate at the primary election, for its nomination to an office, to state that he "affiliated with such party and supported its nominees at the last regular election," is not an unreasonable requirement nor is it violative of sections 1, 6, or 147, of the Constitution; the first declaring freedom and equality, inherent and in alienable rights common to all men; the second that all elections shall be free and equal; and the third, that all elections shall be free and equal; and the third, that all elections by

the people "shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter at the polls and then and there deposited."

4. Elections—Primary Elections—Supporting Party Nominees—How Support May Be Rendered.—The words "supported its nominees" do not necessarily mean that the candidate should have voted for such nominees. Without voting at all, he may have given them active support by advocating their claims, assisting in getting out the vote and, &c., yet by accident or unavoidable casualty have been prevented from attending or voting at the election. The requirement, even if compliance therewith be construed to amount to an admission from the candidate that he voted at the last regular election for the nominees of the party whose nomination he would seek in the primary, does not violate section 147, Constitution, which was designed to protect the secrecy of the ballot, and not the secrecy of party or political belief.
5. Elections—Primary Elections—Object of Act Providing For.—The primary election statute was enacted to promote and maintain party organization and the integrity of party nominations; therefore, open declaration of party allegiance, both on the part of candidates who seek party nominations and voters who confer them, is absolutely essential to the proper working of any primary law.
6. Elections—Primary Elections—Exclusion of Candidate From Ballot—Judgment—Court of Appeals Without Jurisdiction to Review.—As section 27 of the primary election act, restricts candidates whose names may have been wrongfully or erroneously excluded from the primary election ballot, to the summary remedy prescribed therein for righting such wrong or error, and expressly disallows to the candidate or wrongdoer any appeal from the judgment or order the circuit or county judge may enter in the proceeding, the Court of Appeals is without jurisdiction to entertain an appeal from or to review such judgment or order.
7. Statutes—Construction of.—It is a well known rule of law that when a statute has created a right and provided a remedy for the enforcement of that right, the claimant of such right must pursue the remedy the statute prescribes to the exclusion of all other remedies.
8. Elections—Primary Elections.—As section 27 only requires the candidate, whose name has been wrongfully or erroneously refused a place on a party ballot in the primary, to resort to the remedy and follow the procedure it prescribes, it does not prevent electors of the party, whose rights under the act may have been violated, from proceeding by mandamus, as allowed by section 474 Civil Code, to enforce such rights; nor does section 27 deprive them of the right of appeal.

D. J. WHEELER, M. M. LOGAN, Assistant Attorney General for appellant,

ROBT. H. WINN, GEORGE DU RELLE, H. W. BATSON and M. C. KIRK for appellees.

OPINION OF THE COURT BY JUDGE SETTLE—Dismissing appeal in first case and reversing in second case.

These cases were orally argued at the same time, and were together submitted for decision. On the 15th day of May, 1913, the appellee, E. W. Robinson, desiring to become a candidate for the Republican nomination for the office of assessor of Johnson County at the primary election to be held in that county August 2, 1913, tendered to the appellant, Paul C. Hager, clerk of the Johnson County Court, and offered to file in his office, a petition setting forth his qualifications for that office and requesting appellant as such clerk to cause his name to be printed on the official nominating ballot of the Republican party as a candidate for the nomination for the office of assessor to be voted for at such primary election.

The petition is as follows:

“Petition for Assessor of Johnson County. To Paul C. Hager, County Clerk Johnson County, Kentucky, and to the members of the Republican Party of Johnson County, Kentucky: I, E. W. Robinson, reside at Paintsville, Johnson County, Kentucky. I am a member of the Republican party and I am forty-nine years of age and possess all the other legal qualifications necessary to entitle me to hold the office of assessor of said county, to-wit: I am above the age of twenty-four (24) years, a citizen of Paintsville, Johnson County, Kentucky, and have resided in said county and state for more than two years and more than one year next preceding the primary election to be held in Johnson County for the year 1913, in which I am a candidate for the office of County Assessor. If I am nominated for said office of assessor at the primary election to be held on the first Saturday in August, next, I will accept the nomination and will not withdraw, and, if elected, will qualify as such officer. Dated at Paintsville, on this the 15th day of May, 1913.  
“E. W. ROBINSON.”

Tendered with the above petition and at the same time offered to be filed were four other petitions, each from a different voting precinct of Johnson County, and each signed by numerous electors of the precinct from which it came, representing, altogether, more than three per cent and not less than ten per cent of the total vote of the Republican party in Johnson County cast for presidential electors at the last election for president of the

United States. As the four petitions were worded alike only one of them is here copied:

"We the undersigned qualified electors of Paintsville No. 2 Precinct, Johnson County, State of Kentucky, and members of the Republican party, hereby nominate E. W. Robinson, who resides at Paintsville, county of Johnson, as a candidate for the office of assessor at the primary to be held the first Saturday in August, 1913, as representing the principles of said party; and we declare that we intend to support the candidate herein named." (Signed) James W. Turner and fourteen others.

It will be observed that the petition of the appellee, Robinson, contains all the statements prescribed by section 6, chapter 7, Acts of the General Assembly, 1912, entitled, "An Act to provide for the nomination of Candidates by Political Parties at Primary Elections, and for placing the names of candidates on the ballots to be voted for at the general election and prescribing penalties for the violation thereof," Approved March 5, 1912, except that it omits to state that the appellee, Robinson *affiliated with the Republican party and supported its nominees at the last regular election*, for which reason appellant, as clerk, refused to receive or file the petition, or those of the electors, or to place the name of the appellee, Robinson, on the ballots to be voted for as a Republican candidate for the nomination for assessor at the primary election to be held on the first Saturday in August, 1913.

Following this refusal these actions were brought, the one by the appellee, Robinson, and the other by the appellees, James W. Turner and others, in their own behalf and for other signers of the elector's petitions, too numerous to be made parties, praying that appellant, as clerk, be compelled by mandamus to receive and file the petitions in question and proceed to place the name of the appellee, Robinson, on the official ballot of the Republican party at the August primary as a candidate for the Republican nomination for the office of assessor of Johnson County. When the cases came on for hearing appellant filed a demurrer to each of the petitions, which the circuit court overruled. Appellant refused to plead further and judgment was thereupon entered in each case awarding the mandamus prayed. From those judgments these appeals are prosecuted.

It was contended by the Assistant Attorney General in argument that section 27 of the Primary Election Act deprives this court of jurisdiction to entertain these appeals.

That section is as follows:

“Whenever it shall be made to appear by affidavit filed in the circuit court that an error or omission has occurred or is about to occur in the placing of any name on an official primary ballot, or that an error or wrong has been committed or is about to be committed in printing such ballot, or in the performance of any duty imposed by this act, the court shall order the officer or person charged with such error, wrong or neglect, forthwith to correct the error, desist from the wrongful act or perform the duty, or show cause why he should not be compelled to do so. Failure to obey the orders of the judge or court shall be contempt of court and punishable as such. If the circuit court be not in session in the county the circuit judge shall hear and determine the complaint in vacation, unless he be absent from the county, in which case said affidavit shall be filed before the judge of the county court who shall have full power to hear and determine the complaint and make appropriate orders therein. The orders of a court or judge under this section shall be final and not appealable. Only candidates may institute proceedings under this section.

In case a charge under this section is directed against the Secretary of State or any other State officer, the affidavit shall be filed in the Franklin Circuit Court.”

It will be observed that “only candidates may institute proceedings under this section;” if they do so and the relief asked for is denied by the court or judge, the orders or judgment of the court or judge determining the matter “shall be final and not appealable.” In other words, this section compels the candidate to have determined, by the method or procedure therein declared, whether a wrong has been done him in refusing his name a place on his party’s ballot in the primary, yet refuses him or the alleged wrongdoer, the right of appeal, however much either may be dissatisfied with the judgment rendered by the court or judge. To say that this is unwise, not to say unjust legislation, does not make it unconstitutional or even unreasonable, as the right of appeal is not an inherent or constitutional right, but a right which the Legislature may in its discretion confer or withhold. *Turner v. Commonwealth*, 89 Ky.,

78; *Vinegar v. Commonwealth*, 104 Ky., 106. When conferred it is usually coupled with conditions which must be observed, in order that the Appellate Court may have jurisdiction to entertain the appeal. The remedy provided by section 27, is not merely cumulative, as argued by counsel for appellees, which, if true, would allow the candidate to elect between it and the remedy of mandamus allowed by section 474, Civil Code, but it is an exclusive remedy, for it is a well known rule of law that when a statute has created a right and provided a remedy for the enforcement of that right, the claimant of such right must pursue the remedy the statute prescribes, to the exclusion of all other remedies. *Grigsby, &c. v. Barr, &c.*, 84 Ky., 330; *Russell, &c. v. Muldraugh's Hill, &c.*, Turnpike Road Co., 76 Ky., 307; *Kidder v. Boone Co.*, 12 Harris, 196; *Smith v. Drew*, 5 Mass., 516.

Nor do we agree with the contention of appellee's counsel that section 27 is obnoxious to section 59, subsection 29, or section 60, Constitution. It is not special or class legislation. While it does confer upon candidates, as a class, a right and remedy not conferred upon any other class of citizens, both apply to all candidates alike and are not necessary to any other class of citizens, legally speaking.

It was evidently the Legislature's intention that candidates should be compensated for the deprivation of the right of appeal by the speedy effect of the remedy. However, the fact that a statute which creates a new right or remedy expressly disallows an appeal, is not class or special legislation within the inhibitions of the constitution; the right of appeal not being an inherent or constitutional right.

We can well apprehend and deplore the possibilities of disaster to the rights, both of candidates and voters, that may flow from the committal into so many different judicial hands, some of them unskilled and others, perhaps, partisan, the summary and final correction of the evils designed to be prevented by the section of the act in question; but it is not our province to condemn the policy of the Legislature in failing to provide for a revision of the acts of these judicial officers. This defect in the statute, and others that may yet be discovered, should and doubtless will be corrected at the next session of the General Assembly, which will convene at the beginning of the coming year. It follows from what has been said that the appellee, Robinson, in suing for the

writ of mandamus, mistook his remedy, and the circuit court should not have granted the writ. Being the candidate whose petition to be placed on the ballot was not received or filed by appellant, his remedy was to proceed by affidavit filed in the circuit court as required by section 27 of the Primary Election Act. However, whether the judgment awarding Robinson the writ of mandamus be regarded as void, or the petition treated as an affidavit and the proceedings thereunder, including the judgment, a substantial compliance with section 27 of the Act, *supra*, it is manifest that the language of the section does not allow the clerk, any more than the candidate, the right of appeal, or confer upon this court jurisdiction to entertain the appeal. We cannot, therefore, consider the appeal in the case of Hager v. Robinson. We are clearly of the opinion, however, that the appeal in the case of Paul C. Hager, Clerk, v. Jas. W. Turner and others, is properly before us. As voters aggrieved by the action of the clerk in failing to receive and file the petition of Robinson, the candidate for their party's nomination, and their petitions asking that his name be placed as such on the primary ballots, the appellee, Turner, and his associate petitioners, had the right to test the clerk's authority for rejecting the petitions and in doing so attack the validity of the Act under which he claimed such authority. In seeking the writ of mandamus they properly availed themselves of the remedy provided by section 474, Civil Code, and, as previously stated, while section 27 of the Act under consideration, would not have allowed an appeal by the candidate if the judgment of the circuit court had sustained the clerk's refusal to place his name on the primary ballot, and does not allow an appeal by the clerk from the judgment, there is nothing in that section, which prevents the clerk's taking an appeal from the judgment in favor of the appellees, Turner and others.

In *Yates, County Clerk, v. Collins*, 118 Ky., 682, we held that injunction would lie at the suit of a resident voter and taxpayer of the county of Kenton to restrain the clerk from carrying out the provisions of an Act of the General Assembly, approved February 11, 1904, entitled "An Act to amend an Act, entitled an Act, to regulate elections in this Commonwealth, approved June 30, 1892," if the Act, which required the registration of all qualified voters in all cities and towns of the State, without regard to class or population, should be

held unconstitutional. The constitutionality of the Act was, however, upheld, but in respect to the right of the plaintiff to maintain the action, we in the opinion said:

"It is conceded that the appellee is a male citizen, resident and taxpayer of Kenton County, Kentucky; that he possesses the qualifications under the constitution and laws of the State, which entitle him to vote at the approaching November election, and no objection is urged against his right to institute this action. Nor do we question his right to do so, for, in order to carry out the provisions of the Act, *supra*, some expense for printing must be incurred by each county of the state through its county clerks, which is required to be paid out of the county levy. If, therefore, the Act in question is unconstitutional, this expense should not be placed upon the counties, and a taxpayer like the appellee has such an interest in the matter as will entitle him to sue, as he has done, to test its constitutionality."

In *Louisville Home Telephone Co. v. City of Louisville*, 130 Ky., 611, the Telephone Company sued to compel the city by mandamus to sell a telephone franchise, resting its right to maintain the action upon its alleged purpose to become a bidder at such sale. In approving the right of the Telephone Company to maintain the action, we said:

"The question in this case is therefore one of public right, and the object is the enforcement of public duty. And, as we have seen from the authority, quoted, *supra*, in such state of case a relator in a mandamus proceeding need not show that he has any special interest in the result, but it is sufficient for him to show that he is a citizen and resident, and engaged in business in the city, and as such interested in the execution of the law, and that, inasmuch as a public duty here sought to be enforced is not one due to the State in its sovereign capacity, the decided preponderance of American authority is, that private persons may move for a mandamus to enforce such public duty." *Washington ex rel Harvey v. Mason*, 9 L. R. A. (N. S.), 1221.

The right of appellees *Jas. W. Turner* and others to maintain this action is stronger than that of either of the plaintiffs in the cases cited. They are not only qualified voters and members of the political party of which *Robinson* seeks to be made the nominee at the approaching primary election, but they actually assisted in his attempt to get his name upon the ballot by tendering to



the clerk, in support of his right to do so, the petition required by section 6 of the Primary Act, in doing which, they were endeavoring to perform a duty they owed to their party and to the public as well. It can well be said, therefore, that the rejection of their petition and that of their candidate by the clerk, if without legal cause, as alleged, constituted a violation of their personal rights, and, at the same time, prevented them from performing a duty which they owed to their party and to the state of which they are citizens.

This brings us to a consideration of the objections urged to the constitutionality of the Act, which are raised by both appeals.

It is insisted for appellees that section 6 of the Act violates sections 1, 6 and 147 of the Constitution of the state; the first declaring freedom and equality inherent and inalienable rights common to all men; the second, that all elections shall be free and equal; and the third, that all elections by the people "shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited."

We have twice held that there is no provision of the Constitution having reference to primary elections. *Montgomery v. Chelf*, 118 Ky., 766, the first case in which we so held, involved the validity of a former primary election statute which was attacked upon the ground that it was obnoxious to section 6 of the Constitution. In rejecting this contention we said:

"But it is urged that, if the statutes mean this, (i. e. that each candidate should pay his proportion of the cost of holding the primary) it conflicts with the Constitution (section 6), which provides that 'all elections shall be free and equal.' That section of the Constitution has no reference to primary elections, but applies only to general elections. Section 148 of the Constitution provides that not more than one election can be held in any district in each year, except as otherwise provided in the Constitution. The Constitution nowhere makes provision for holding primaries. Therefore, if the word 'election,' as used in the Constitution, includes primary elections, the Constitution effectually prohibits the holding of primary elections at all. There is a general election every year, and if a primary cannot be held in the same year with a general election, it cannot be held at all. To make it more plain, if the Consti-

tution only authorizes one election to be held within a year, and a primary election is an election within the meaning of the Constitution, then to hold a primary election and a general election the same year would be violative of this provision of the Constitution."

In *Hodge v. Bryan*, 149 Ky., 110, we again held that a primary election is not an election in the meaning of the Constitution. In this case we had under consideration the validity of certain features of the present primary law; with respect to which we said:

"The Constitution does not require the legislature to enact primary election laws. It makes no reference to them, therefore, as the Constitution does not prohibit them, the legislature had a right to pass such a law. In *Montgomery v. Chelf*, 118 Ky., 766, this court expressly declared that the word, 'election' as used in the Constitution, had no application to primary elections. The word 'election' as used in the primary law does not refer, in fact, to the election of an officer. It only means that the people should on the first Saturday of August in each year select, by means of a primary election, persons as a candidate to be voted for at the general election held the following November. There is no election in August; it is only a selecting or naming of candidates to be actually voted for at the November general election."

It being manifest that there is nothing in the Constitution prohibiting the legislature from enacting a law requiring party nominations to be made by means of primary elections, it necessarily follows that it has the power to provide by law that nominations of party candidates for office shall be made in no other way; to prescribe the time of holding and manner of conducting the primary elections by which such nominations are to be made; and also to impose such reasonable conditions and tests as to party membership or affiliation, as shall entitle those seeking party nominations to get their names upon their party ballots as candidates. In other words, the power that may thus be exercised by the legislature, need not be expressly conferred upon it by the Constitution, it is sufficient if its exercise be not prohibited by that instrument. Recognition of this doctrine has been expressed by Judge Cooley in his work on *Constitutional Limitations* (7th Ed.) sections 236-237, as follows:

"The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon legislative power, it must be considered as absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against the unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution.\* \* \* Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid must be enforced unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

Authority should not be required to convince a reflecting mind that a primary election, held merely to name the candidates of a political party or parties, is not an election within the meaning of the provisions with respect to elections, found in the Constitution. In every instance those provisions refer to the election of officers and not to the nomination of candidates. It is undoubtedly the general rule that state legislatures have the inherent power to enact reasonable primary election laws. In some jurisdictions provisions have been made for such laws by amendments to the state constitutions giving the Legislature express authority to pass laws regulating the conduct of primary elections. But, in a majority of the states, perhaps, constitutional authority for the enactment of such laws is wanting; however, it has nowhere been held that the absence of such express constitutional authority will prevent the Legislature of a state from enacting such a law and making it compulsory in its operation. *State v. Nuchal* (La., 1908), 46 So. Rep., 430; *State v. Miles*, 210 Mo., 127; *Healt v. Whipf* (S. Dak., 1908), 117 N. W. Rep., 521; *Morrow v. Whipf* (S. Dak., 1908), 22 S. D., 146; *State v. Felton, &c.*, 77 Ohio St. Rep., 554.

It is conceded by the appellant that the petition tendered him as county clerk by the appellees, Turner and others, complied with the requirements of section 6 of the

primary election act, but insisted that he had the right to refuse to receive it, because the petition of Robinson, the candidate in whose behalf it was offered to be filed, failed to state that he "affiliated with the Republican party and supported its nominees at the last regular election," for which reason it was his duty to reject both petitions. On the other hand, it is appellees' contention (and such was the ground upon which the circuit court awarded the mandamus) that the petition of candidate Robinson was sufficient without the statement that he "affiliated with the Republican party and supported its nominees at the last regular election;" and that the requirements of section 6, that such statement be made in the petition, is unenforceable because violative of section 147, Constitution, which provides for and protects the secrecy of the ballot. In other words, it is the contention of appellees that the secrecy of the ballot demanded by section 147, Constitution, is not only a secrecy at the moment of voting, but for all time thereafter, and that a voter, after voting, cannot be compelled to declare how he voted. It is true, as argued by counsel, that the effect of our holding this single provision of section 6, unconstitutional, would be to leave the primary election act in other respects unimpaired; and likewise true, that the question whether this provision is or not constitutional was not raised in *Montgomery v. Chelf* or *Hodge v. Bryan*, *supra*. We are of opinion, however, that it was in effect therein decided by the declaration that a primary election is not an election within the Constitution.

This self evident fact is persistently ignored in every argument advanced against the constitutionality of section 6 of the primary act. In numerous cases relating to regular elections held by constitutional authority, the legality or result of which were in question, this court has gone to the limit in protecting the secrecy of the ballot. *Commonwealth v. Barry*, 98 Ky., 394; *Mayor v. Barker*, 99 Ky., 305; *Banks v. Sargent*, 104 Ky., 843; *Nall v. Tinsley*, 107 Ky., 441; *Cole v. Nunnally*, 140 Ky., 138. While any attempt to compel the individual voter to disclose how or for whom he voted at a regular election would not be allowed, there is no prohibition against a voluntary disclosure by him, unless it be made to affect the conduct or result of a regular election. But when a voter offers himself, as did E. W. Robinson, as a candidate for nomination to an office at the hands of a political party with which he claims membership, proposing to have his

claim to such nomination determined by the electors of the party at a primary election held under the primary election law of the state, he must submit himself to such reasonable regulations or tests as may be required of candidates by the law under which the primary election is held; and if one of these tests requires him to state, in order to get his name on his party's ballot, that he supported the nominees of the party, of which he seeks a nomination, at the last regular election, he must do so, and the disclosure, even if it should give the names of the persons for whom he voted, will not violate the provisions as to the secrecy of the ballot contained in section 147, Constitution. The tests to which the candidates are subjected by the primary election law of this state, are contained in section 6 of the Act. One of them is, that he must have affiliated with the party whose nomination he seeks, and also have supported its nominees at the last regular election. The words, "supported its nominees," do not necessarily mean that the candidate should have voted for such nominees. Without voting at all he may have given them actual and even active support, by advocating their claims, contributing to the legitimate expenses of their campaign, getting out the vote and in other proper ways, yet by accident or unavoidable casualty have been prevented from attending the election. Therefore to require one to say that he supported the nominees of his party at a former election would not necessarily compel the admission on his part that he voted for them; for this reason, if no other were apparent, it cannot be said that the test here imposed invades the secrecy of the ballot. In nearly all the states having a compulsory primary election law, this and similar tests have been held to be reasonable. *Webber v. Felton*, 77 Ohio St. Rep., 554; *Ladd v. Holmes*, 40 Or., 167; *Morrow v. Whipf* (S. D.), 115 N. W., 1121; *State ex rel. McCarthy v. Moore*, 87 Minn., 308; *State ex rel. Labaune v. Michel*, 121 La., 374; *State ex rel. McCue v. Balisdell* (N. D.), 118 N. W., 141; *State ex rel. McCue v. Berry* (N. D.), 118 N. W., 150; *Katz v. Fitzgerald*, 152 California, 433.

It should be kept in mind that it is the secrecy of the ballot and not the secrecy of the party or of political belief that section 147, Constitution, is designed to protect. The State of Minnesota has a primary election law containing the provision that if a candidate, after permitting his name to go on the party ballot, suffers defeat in the primary, his name cannot be placed on the ballot as a

candidate, whether of another party or as independent, at the succeeding regular election. Notwithstanding the attack upon that provision of the Act the Supreme Court of that State in *State ex rel. McCarthy v. Moore*, supra, upheld its constitutionality and declared it a reasonable regulation.

In the opinion it is said:

"It is claimed for petitioner that this statute, in forbidding one who voluntarily becomes a candidate for a party nomination at the primary election and fails to secure it from having his name on the official ballot, interferes and materially impairs his eligibility for the office for which he failed to be nominated; and it is further claimed that every person who is eligible thereto has the right to be a candidate for an office whether he has already sought it as a party representative or not. This guarantee of the organic law relates to essential qualifications, and dispenses with any other test to hold office (as birth, education and the like) than the right to vote, and this, we apprehend is the extent of the guaranty. It is not attempted therein to provide regulations for voting, nor the details of the candidacy of the aspirant. The right to vote and the right to hold office are declared to be co-ordinate. The methods by which these rights shall be protected and enforced are, of necessity, left to legislative action; but we shall readily assume that it is an inherent right of citizenship that only such a system of regulation be provided for as will be just and reasonable and operate in its application to all voters and to candidates equally. \* \* \* Of necessity there must be upon such a ballot a regular order in which the names shall be placed; and other features incident to the procedure that tend to create incidental advantages to one candidate over another; but it would seem proper that any candidate who seeks the assistance of a primary election law to aid him in securing party support should be bound by the application of good faith and the dictates of fair play to which he has voluntarily subjected himself. It is said by this law to a candidate 'if you prefer the advantages of a party nomination which is quite desirable you may seek it; but if the state prepares and prints your ballot and regulates nominations so as to secure the utmost freedom of choice among the members of your party, it does so upon the submission by you to the condition that if you are unsuccessful, it will not thereafter print your name upon the ballot to defeat your opponent;' and it

could not be said, because this is refused, that it is an unreasonable condition, but rather an imposition of even handed justice that would have been bestowed upon his previous contestant, had the result been otherwise." *Miller v. Flaherty*, 41 L. R. A. (N. S.), 132.

In *Shostag v. Cator*, 151 California, 604, in passing upon the constitutionality of a provision of the primary election law, which requires registraton before the elector votes, the Supreme Court of that state said:

"It is contended that the test prescribed by section 1366a is unreasonable, because, with the close of the registration, the elector loses his right to change his party allegiance in consequence of a change in political convictions, and is precluded from taking part in the election of delegates at the convention of the party with which on the day of the election his more matured opinions would impel him to cast his lot. This inconvenience certainly does result from the provisions of the act, but the Legislature, which must be presumed to have foreseen it, probably regarded such sudden conversions during the short interval between the close of registration and the date of the primary election as likely to be of such rare occurrences as not to justify the omission of a provision evidently designed to prevent unscrupulous and mercenary electors from holding themselves free down to the day of election to, vote with any party upon any corrupt motive, for the purpose of influencing the nomination if its candidates for public office, while without any interest in their success, and perhaps with an interest in their defeat. If it shall sometimes happen that a conscientious voter is converted from one political faith to another between the close of registration and the primary election, he may console himself for the loss of his vote by the reflection that his loss is trifling in comparison to his share of the advantage to the state of which he is a citizen flowing from a measure which tends to prevent a grave abuse, especially in those centers of population where the Primary Election Law is made obligatory."

In *Ladd v. Holmes*, *supra*, the court in discussing the right of the Legislature to prescribe an additional test for, those who participate in the primary election, used this language:

"The act is none the less valid because it provides for a party election, or, to speak more precisely, elections had at party primaries. All electors or parties author-

ized or required to hold such elections are entitled to vote at their respective party primaries and not elsewhere. It is not true that every citizen accorded the elective franchise under the Constitution is entitled to vote at all elections. \* \* \* So it is where party primary elections are held, such as are authorized and required by law, and under the supervision and inspection of public functionaries; it is not a violation of the Constitution that all electors are not permitted to vote at a particular party election. Electors of one party have no desire, unless prompted by sinister or evil motives, nor have they any inherent right, within or without the Constitution, to vote at some other party primary or election; hence no right or privilege of which they can complain has been entrenched upon or violated. We see no objection to the Legislature providing for party elections, and limiting the electoral privilege to party members. The exclusion of other party members from participating in such elections is not an infringement or denial of a constitutional right or privilege."

The Supreme Court of Nebraska in *State v. Drexel*, 74 Neb., 776, in its consideration of the primary election law of that state, indulged in the following pertinent language.

"By section 19 of the Act the right of an elector to vote at a primary is made to depend upon his political affiliation with the party for whose candidates he desires to cast a ballot. It is therein provided that no person shall 'be entitled to vote at such primary election until he shall have first stated to the judges of said primary election what political party he affiliated with, and whose candidates he supported at the last election, and whose candidates he intends to support at the next election.' Provisions are also made for challenging any person offering to vote at such primary election, and for his making oath to the truth of the statements above required as to party affiliation, and his support of candidates of the party with whom he is offering to vote. It is difficult to perceive any valid objection to provisions of this character, when applied to a Primary Election Law. These laws replace party nominating conventions. The regulation of the membership of the party and of the right to participate in the nomination of its candidates, in this respect, is taken from the party and placed in the control of the Legislature. The integrity of the party and the success of its principles and policies can be best maintained



by the participation in its affairs of those only who are at heart in sympathy with the objects and ends to be attained by the organization, and loyal to its tenets. An indiscriminate right to vote at a primary would tend, in many instances, to thwart the purposes of the organization and destroy the party. A hindrance to one, not a member of a party, from participating in the selection of the party's delegates and candidates can in no proper sense be said to interfere with the free exercise of the elective franchise as guaranteed by the Constitution. All that is required is that the party offering to vote at the primary, in order to be entitled to vote with either of the parties engaged in nominating candidates thereat, shall have affiliated with such party, supported its candidates generally at the last election, and intend to do so at the next. Open declaration of allegiance to party is absolutely essential to the proper working of any primary law."

In *Ex Parte Wilson*, decided July 18, 1912, 125 Pacific Reporter, 739, the Supreme Court of Oklahoma in the opinion delivered therein said:

"It is alleged that the elector named in the opinion was a duly qualified and registered elector of the precinct named, but did not register as a Democrat. \* \* \* The propositions presented are, first, whether or not a qualified elector, who is not a member of any political party having official ballots at a general primary election, is entitled to vote at such a primary election. Second, whether or not an elector may vote the ballot of any party he chooses to select whether he is a member of that party or not. Upon careful consideration, we are of opinion that the constitutional provisions contemplated that only electors who are members of political parties shall participate in the primary election for the selection of candidates for the respective parties, and then vote only the ballot of the party of which they are a member, and that non-partisan electors having no party affiliations are relegated to their right to participate in the nomination of candidates for elective office by petition in the manner provided for by the Primary Election Law. A few plain and unquestionable propositions will sufficiently present the views of this court in support of this position.

Political parties are voluntary associations of electors, having an organization and committee, and having distinctive opinions on some or all of the leading politi-

cal questions of controversy in the state, and attempting through their organization to elect officers of their own party faith and make their political principles the policy of the government. They are governed by their own usages and establish their own rules.

No one with any knowledge of the history of our country will contend for a moment that political parties have not played an important part in shaping the destinies of our government; nor that they were not a powerful and necessary force in a successful administration of the affairs of the national and state governments. So potent have they become in determining the measures and administering the affairs of government, that they are now regarded as inseparable, if not essential to, a republican form of government. \* \* \* The object of holding a primary election by a political party is to select party candidates, and it is too plain for argument that no voter should be permitted to vote at a primary election of a political party, unless he is a member of such a party; and unless provision is made to prevent persons voting at a primary election for the candidates of a party who are not affiliated with such party, the whole scheme of nominating party candidates by a primary election would fail, because of being incapable of execution. \* \* \*

“A primary election is one for the nomination of candidates for office of the respective political parties by the members thereof. If Republicans vote the Democratic party ballot, and Democrats vote the Republican party ballot, a Socialist vote any ballot but their own, then nomination so made cannot be said to be party nomination. It needs no argument for the position that to permit electors participating in a primary election to vote indiscriminately any party ballot they might choose to select, regardless of their party affiliations, would be simply putting a premium upon deceit, dishonesty and fraud, and would make it possible for the worst elements of the several political parties participating to direct and control their nominations. Obviously all of the provisions of the primary election law were enacted by the Legislature to prevent electors from voting any ballot except that of their respective parties, and thereby prevent fraud and preserve the purity of the ballot. The constitutional provision of the primary election law provides only for party elections.

No specific provision is made by the primary law for testing the qualifications of an elector as to his party affiliation. The inquiry is, by the general election law, confined to the qualifications enumerated, in which this is not included. Under the foregoing provision, when an elector demands a party ballot, if the election inspector, judge, or party watcher knows or has reasons to believe that the elector offering to vote is a non-partisan or not a member of the party whose ballot he is attempting to vote it is the duty of such election officer to challenge the right of such elector to vote. \* \* \* If the challenge be on the ground that the elector is not, in good faith, a member of the party whose ticket he is attempting to vote, the duty of the inspector is the same as upon a challenge as to any other qualification. An elector who resists the challenge and makes oath that he possesses the qualification contemplated by the Constitution should bear in mind that the usual test is, did the elector vote the party ticket at the last preceding general election? Another rule of party membership is: an elector who affiliates with the party and stands by his party organization, and as such member yields obedience to party rules and usages and accepts and supports the regular party nominations. \* \* \* Here, in the absence of a statutory test of the party qualifications of electors at a primary election, the rules and usages of the respective political parties having official ballots to be voted at such primary election must control."

All that is said by the authorities, *supra*, as to tests of party loyalty and party membership, applies with equal force to electors voting and candidates voted for in primary elections; and whether applied by legislative enactment to the one class or the other, or both, they are equally reasonable. It is to be remarked that the object of the present primary election law is, to purify the politics of the state by preventing frauds and wrong doing in making nominations; and it will be in the interest of political parties and the welfare of all the citizens of the state to effectuate the salutary purpose designed by its enactment. Indeed, no political organization can be effective that does not command public confidence and respect; therefore, the integrity of all party nominations should be so manifest as to put them above being called in question. That the act manifests little concern for the independent voter is because of his resentment of party restraint and disavowal of party allegiance. It, how-

ever, neither discredits his citizenship nor interferes with his rights, but leaves him free to support, at regular elections, the nominees of one of the political parties, or to vote for candidates without nominations. Moreover, the independent candidate can by petition, as provided by section 1453, Kentucky Statutes, get his name on the ballot at a regular election under a device other than that of a party designated by the petition. That the act is in some respects in need of amendment, a cursory reading of it will demonstrate, but it cannot fairly be said of any of its provisions with respect to the qualifications it requires of those who would participate in or be nominated at the elections held thereunder, that they are unreasonable, or obnoxious to any provisions of the State's Constitution. Applying its provisions to the case in hand we find that the elector's petition which appellees, Turner and others, tendered appellant in aid of that of the candidate, Robinson, to get his name on the Republican primary ballot, though sufficient in form and substance, was properly rejected by appellant, because of the insufficiency of that of the candidate, which failed to state that he "affiliated with the Republican party and supported its nominees at the last regular election." But because of our want of jurisdiction of the appeal prosecuted by appellant in the action brought by Robinson, the candidate, we cannot direct that the name of the latter be not printed on the ballot as was directed by the circuit court; but the judgment rendered by that court which directed appellant to receive and file the petition of the appellees, Turner and others, is reversed and cause remanded, with direction to the circuit court to dismiss their petition. The appeal prosecuted by appellant from the judgment rendered in the action brought against him by the candidate, Robinson, is hereby dismissed.

Whole court sitting, except Judge Nunn, whose illness compels his absence.

**Gardner v. P. S. Ray, Clerk.**

(Decided June 20, 1913.)

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, First Division).

**Ewald v. Same.**

Appeal from Second Division.

**Tyler, et al. v. Same.**

Appeal from Third Division.

**Johnson, et al. v. Same.**

Appeal from Fourth Division.

1. Elections—Primary Elections—Requirements of One Becoming a Candidate in.—One who files his petition to become a candidate for a party nomination in the State primary election must, as required by section 6 of the primary election act in order to get his name on the party ballot, state therein 1, that he is a qualified elector; (i. e. of the party whose nomination he seeks) 2, that he is a member of such party; 3, that he affiliated with such party and supported its nominees at the last regular election.
2. Elections—Primary Elections—"Qualified Elector"—Definition of.—In a municipality where registration obtains, both registration and declaration of party affiliation are required by section 19 of the act, to qualify voters to participate in primary elections. The qualifications of electors being defined by section 19, that definition must be applied to the term "qualified elector" in section 6.
3. Elections—Primary Elections—Constitutionality of Act Providing for.—The act is not repugnant to the Fourteenth Amendment to the Constitution of the United States, as it does not abridge any privileges or immunity of a citizen of the United States. The privileges and immunities therein protected are those which arise out of the nature and essential character of the national government, the National Constitution, the National treaties, or the acts of Congress, as distinguished from those belonging to the citizens of the State.
4. Elections—Primary Elections—Constitutionality of Act Providing for—Province of Legislature.—In enacting the present primary election law the Legislature did not, in so far as the objections made to its constitutionality in these two cases are concerned, transcend its powers, the question as raised being wholly political and relating wholly to the manner in which the Legislature exercised its power, are matters with respect to which the Legislature was more competent to decide than are the courts.

PERCY N. BOOTH, ALEX. G. BARRETT, JOHN B. BASKIN, R. A. McDOWELL and WILLIAM KRIEGER for appellants.

A. SCOTT BULLITT, J. L. SULLIVAN and M. M. LOGAN, Assistant Attorney General for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Dismissing Appeals in First Two Cases and Affirming Judgments in Second Two Cases.

The above four appeals have been considered together, but the judgment in *Charles T. Gardner v. P. S. Ray*, and that in *George R. Ewald v. P. S. Ray*, section 27 of the Primary Election Law deprives us of the jurisdiction to review. That section was so construed by us in the cases of *Paul C. Hager v. E. W. Robinson*, and *Paul C. Hager v. James W. Turner, &c.*, this day decided; and as the one opinion in those two cases fully presents the reasons for such construction, it is deemed unnecessary to repeat them here. The two appeals referred to are therefore dismissed. But for the further reasons expressed in the opinion in the *Hager* cases, *supra*, we have jurisdiction of the two remaining appeals, *W. S. Tyler, &c. v. P. S. Ray* and *Carl C. Johnson v. P. S. Ray*, and consideration of the questions raised by these appeals convinces us that the action of the circuit court in sustaining a demurrer to each of the petitions was not error. These two cases, and those of *Charles T. Gardner v. P. S. Ray* and *George R. Ewald v. P. S. Ray* were heard together by the four judges of the Common Pleas Branch of the Jefferson Circuit Court. Like the *Hager* cases, they attack the constitutionality of the present Primary Election Law, urging the same and additional grounds against its validity. We find in the record an admirably written opinion upon the questions presented and decided, in which the four circuit judges, who tried the cases, concurred. Though expressing the views entertained by them relative to all the cases they were considering, it is applicable to the only two of the cases before us on appeal, viz: *W. S. Tyler, &c. v. P. S. Ray*; *Carl J. Johnson, &c. v. P. S. Ray*. We have adopted and here insert, so much of the opinion as we find in accord with the conclusions we have reached. It is as follows:

“In each petition a writ of mandamus is asked against the clerk of the Jefferson County Court to compel him to act according to plaintiffs construction of cer-

tain provisions of the Act of March 5, 1912, providing for nominations by the leading political parties of their candidates for office at primary elections. Chares T. Gardner, desiring to become a candidate at the primary election to be held under the Act mentioned on August 2, 1913, for the nomination of the Progressive Party for Representative from the Forty-fourth Legislative District, tendered to the clerk of the Jefferson County Court, as required by the Act, his petition, supported by the requisite nominating papers, asking that his name be placed upon the nominating ballots of that party. The clerk declined to file the petition, on the ground that it showed that Gardner was not qualified under the terms of the Act to become a candidate at the primary election of the Progressive Party. The petition contains the following statement:

"I am a member of the Progressive political party and affiliated with it and supported its nominees at the last regular election, which was on November 5, 1912. On the \_\_\_\_ day of October, 1912, at the registration next preceding said election, I was fully registered as affiliating with the Democratic party."

George R. Ewald tendered to the county clerk his petition to have his name printed on the ballots of the Progressive party as a candidate for that party's nomination for Representative from the Forty-sixth Legislative District. For reasons similar to those which led him to reject Gardner's petition, the county clerk declined to file Ewald's application. Ewald's petition contains the statement: "I am a member of the Progressive Political Party."

C. J. Cunningham tendered a petition that his name be placed upon the nominating ballots of the Democratic party to be voted at the August primary as a candidate for the Democratic nomination for Representative from the Fifty-first Legislative District. His petition was also rejected. It contains the statement: "I am a member of the Democratic political party, and affiliated with it and supported its nominees at the last election, to-wit: November 5, 1912." He registered as a Republican.

"Carl J. Johnson, Charles I. Groves, and Theodore H. Diehl, who signed the nominating papers of Gardner have instituted a suit against the county clerk, seeking to compel him to place Gardner's name on the ballots of the Progressive party.

"W. I. Taylor; A. R. Bierbaum and Jacob Emmetsberger, Jr., who signed the papers of Ewald, have filed a similar suit. In each of these cases the interest of the plaintiffs is that of qualified electors of the Proressive party who desire to vote their choice at the primary. These two suits involve the same questions involved in the actions of Gardner, and Ewald, respectively. In each of the five cases, the plaintiff has entered a motion for a writ of mandamus against the county clerk; in each case, the defendant has demurred generally to the petition; the cases are submitted on the following motions and demurrers.

"With this preliminary, we come to a consideration of the Act of 1912, relative to the qualifications of prospective candidates at primary elections and to the petitions by which they must initiate their candidacy. Sec. 6 provides:

"Any qualified elector who files his petition and the nominating petition of electors as hereinafter provided, and is a member of a political party subject to the provisions of this Act, shall have his name printed on the official nominating ballot of his party as a candidate for nomination for any office at any primary election held under the provisions of this Act. Said petition shall state the name, age, postoffice, address, political affiliations and all other legal qualifications of the candidate, and shall be in substantially the following form.

"The form prescribed requires that the petition be addressed to the officer with whom it is required to be filed and 'to the members' of the particular party whose nomination the candidate is seeking. The candidate must fill in the following form:

"I am a member of the..... political party and affiliated with it and supported its nominees at the last regular election.

"The 'nominating petition' referred to in the excerpt first made from Sec. 6 cannot be signed by any one who is not a 'qualified elector' and 'member' of the political party whose nomination the candidate for whom he has signed is seeking and who is not registered if he lives in a precinct where registration is required. 'Signatures contrary to the foregoing provisions,' so closes Sec. 6, 'shall not be counted.' Sec. 6, therefore, very emphatically confines the right of voters to sign the nominating petitions with which candidates for nomination are required to support their own individual



petitions, to those of candidates seeking nominations at the hands of the particular parties of which the signers are respectively qualified electors. So much for the signers.

"As to the candidate, an analysis of Sec. 6 shows that as a condition precedent to the right to seek nomination by any party required to nominate by primary one must have the following personal qualifications:

"1. He must, at the time he files his petition to become a candidate, be a qualified elector;

"2. He must, at the time he files his petition, be a member of a political party;

"3. He must have, heretofore, affiliated with that party of which he is a member at the time of filing his petition.

"He must have supported the nominees of that party at the last regular election.

"Any one who measures up to these qualifications, and who complies with the formalities prescribed, is entitled to have his name printed upon the official nominating ballot of 'his party' as a candidate for nomination at a primary election.

"When Sec. 6 speaks of 'qualified electors' the reference is, obviously, to electors within the contemplation of the act of which it is a part and which provides for and governs primary elections at which candidates for office are nominated by the voters of political parties as distinguished from regular elections at which officers are chosen by the whole electorate. It is manifest from even a casual reading of Sec. 6 that the 'qualified elector' who seeks the nomination of any party must be a 'qualified elector' of that party and no other.

"Sec. 19 of the Act enumerates the 'qualifications of electors' the reference being particularly to those having the right to vote at a primary election. These must possess the qualifications of voters at regular elections, Sec. 145, Constitution, prescribes the qualifications of voters at regular elections. Sec. 147 authorizes the Legislature to require registration in certain cities and towns and declares that 'where registration is required, only persons registered shall have the right to vote.' The Legislature has required registration in certain municipalities, including that class of which the City of Louisville is one. Secs. 1490 and 1499, Kentucky Statutes, set aside certain days preceding the regular election day in November of each year for the

registration of voters, Sec. 1555 required the officials to ask of each person the question, 'What political party do you desire to affiliate with?' and to record his answer, if he chooses to give one, in the registration book, one must have the constitutional qualifications and, in addition, in precincts where registration is required, must have registered during the days set aside for that formality immediately preceding the impending election in which he desires to participate. These qualifications are, by Sec. 19 of the Act of 1912, essential to enable one to participate in a primary election.

"In addition to these qualifications of a voter in a regular election, Sec. 19 prescribes the special qualifications of an elector in a primary election:

" 'In precincts where registration is required, no elector, except those entitled to be specifically registered as herein provided, shall be entitled to vote in any primary unless he is registered in the registration book of said precinct for the preceding year as affiliating with the party whose ballot he offers to vote. If so registered he shall be entitled to vote the ballot of the party with which he is registered, and no other. In other precincts qualified electors shall be allowed to vote only the ballot of that party with which they declare their affiliation.'

"Sec. 20 of the Act authorizes a special registration to be held fourteen days prior to the date of the primary election, at this, voters who were, for certain specified causes unable to register at the registration of the preceding fall and those who were not then qualified to do so may be registered for the purpose of voting in the primary of that party of which they declare themselves members.

"There is, therefore, no escape from the plain meaning of Sec. 19 that registration and declaration of party affiliation, in precincts where registration is required are necessary to qualify voters to participate in primaries. The 'qualifications of electors' being defined by Sec. 19 that definition must be applied to the term 'qualified elector' in Sec. 6, a 'qualified elector' being neither more nor less than one possessing the 'qualifications of electors.' Board of Councilmen of Frankfort v. Commonwealth, 29 R., 699.

"It is very clear, in consequence, that no one who resides in a precinct where registration is required is a 'qualified elector' unless he has registered and de-

clared his party affiliation; and Secs. 6 and 19 demonstrate beyond question the intention of the Legislature to strictly confine the nominations of the parties to which the Act of 1912 applies to their respective qualified electorate.

"The petition tendered by Gardner to the county clerk showing that at the registration preceding the last regular election he registered as a Democrat; he is, consequently not a qualified elector of the Progressive party whose nomination he seeks.

"The petition tendered by Ewald, while stating that he is a member of the Progressive party, does not show that he affiliated with it and supported its nominees at the last regular election, as is required by Sec. 6. Moreover, it appears from the record that he registered as a Democrat; like Gardner, therefore he is not a qualified elector of the Progressive party.

"The petition which Cunningham tendered to the county clerk, while stating that he is a member of the Democratic party and affiliated with it and supported its nominees at the last regular election, shows that he registered as a Republican. He is not a qualified elector of the Democratic party.

"It follows that the county clerk properly rejected the petition of Gardner, Ewald, and Cunningham, unless the Act of 1912, under the terms of which he acted, is open to some constitutional objection. It is unnecessary to the decision of these cases to consider or determine what is meant by the requirement of Sec. 6 that the petitioner states that he has affiliated with a particular party and supported its nominees at the last election.

"A clear purpose of the Legislature evidenced in the Act is the preservation of the integrity of the dominant political parties. This is to be accomplished, in those localities in which registration is required, by confining the right to vote in the primary of any party to the publicly declared and legally recorded members of that party and by restricting the right of candidacy for the nominations of any party to the publicly declared and legally recorded members of that party who have been such, at least since the registration preceding the last regular election—that is to say, during a period of about nine months. Putting aside the question as to the voter, with whom we are not here called upon to deal, the Act substantially prescribes the qualifications

of candidates for party nominations at party primaries, one being that they shall have been members of the parties whose nominations they respectively seek since the registration preceding the last election.

"It is objected that this excludes from candidacy for nominations several classes of persons: (1) Those who registering or voting at the last regular election as members of one party, in good faith change their political views and desire to seek the nominations of other parties; (2) Those who, becoming of age, since the last regular registration and election, aspire to candidacy for nominations; (3) Those who, while legal voters, were by unavoidable casualty or misfortune prevented from registering or participating in the last regular election; (4) Those who, moving from other states into precincts of this state where registration is necessary since the last registration and election, had no opportunity to register or to participate in the last election; and (5) Those who, moving from precincts in this state where registration is not required into precincts of this state where it is required, could not register prior to the last election. It is claimed that in view of the exclusion of these several classes from the right to become candidates for party nominations they are denied a privilege which is specially accorded others, contrary to those prohibitions of the State Constitution against the granting of exclusive privileges and relative to the exercise of arbitrary power and contrary to the declaration of the Fourteenth Amendment to the Federal Constitution that no state shall abridge the privileges and immunities of citizens of the United States.

"Considering first the alleged repugnance of the Act of 1912 to the Fourteenth Amendment, it seems sufficient to say that the privileges and immunities of citizens of the United States which are protected against abridgment by the states are those which arise out of the nature and essential character of the National government; the National Constitution, the National treaties, or the acts of Congress, as distinguished from those belonging to the citizens of a state. *Slaughter House Cases*, 16 Wall., 36.

"The right to a voice in the selection of officials is not such a privilege; it is a mere political right, conferred by the state alone upon such equal conditions as it deems wise, which the Legislature may regulate to any extent not prohibited by the Constitution, State and

Federal. *Minor v. Happersett*, 21 Wall, 162; *Cooley Constitutional Limitations* (6 Ed.), 762.

"The exclusion by the state from the right of suffrage carries with it the exclusion from the right to hold office. *Atchison v. Lucas*, 83 Ky., 451.

"If exclusion from the right to vote is not an abridgment of the privileges of citizens of the United States, exclusion from the kindred political right to hold office is not; this being true, neither is exclusion from the right of candidacy for office such an abridgment. How much less is exclusion from candidacy for mere nomination as a candidate for office.

"Coming now to the particulars in which the Act of 1912 is said to be offensive to the Constitution of Kentucky, the opinion of the Court of Appeals of Kentucky touching this legislation in *Hodge v. Bryan*, 149 Ky., 110, seems to necessarily exclude the idea that it grants exclusive privileges or is an expression of arbitrary power. The Legislature may prescribe qualifications for office holders, but it cannot exclude persons from office or from candidacy for office. In *re Callahan*, 200 N. Y., 59; 93 N. E., 262; *Rathbone v. Wirth*, 150 N. Y., 450; 34 L. R. A., 408; *Indiana v. Denny*, 4 L. R. A., 65, (Ind.); *Evansville v. Indiana*, 4 L. R. A., (Ind.).

"If the Act of 1912 operated to exclude from public position any one qualified to hold office or interfered with the enjoyment of the elective franchise, it would be invalid. But it has no bearing on the right to hold or become a candidate for office or upon the right of suffrage. The primary provided for is not an election within the meaning of the Constitution. *Hodge v. Bryan*, 149 Ky., 110; *Montgomery v. Chelf*, 118 Ky., 766.

"The Act of 1912 dealt, as its title indicates, with 'the nominations of candidates by political parties at primary elections' and the 'placing of names of candidates on the ballots to be voted for at general elections.' The right of any qualified person who may desire to run for office is fully preserved by other appropriate legislation. It is argued that the Act is invalid in that it prevents two or more parties nominating the same candidates and the contention is supported by authority. It has been held that, in the absence of statute, a candidate's name may appear more than once on the ballot: *Miller v. Pennoyer*, 23 Ore., 364; 31 Pac., 830; *Payne v. Hodgson*, 34 Utah, 269; 97 Pac., 132; *Fisher*

v. Dudley, 74 Md., 242, 12 L. R. A., 586; Simpson v. Osborne, 52 Kan., 328, 34 Pac., 747.

"It has been held also that a statute prohibiting the appearance of a candidate's name on the ballot more than once is invalid: Murphy v. Curry, 137 Cal., 469; 59 L. R. A., 97; In re Callahan, 200 N. Y., 59; 93 N. E., 262; Johnson v. Grand Forks Co., 113 N. W., 1074, (Ind.).

"Such statutes have also been upheld: Todd v. Election Commissioners, 104 Mich., 474; 29 L. R. A., 330; State v. Bode, 55 Ohio St., 224, 34 L. R. A., 498; State v. Porter, 13 N. D., 406; 67 L. R. A., 473; State v. Superior Ct., 60 Wash., 370, Ill. Pac., 233.

"In Kentucky, Sec. 1454 of the Statutes governing regular elections provides that where a person has been nominated by convention and is also a candidate by petition, 'his name shall be placed on the ballot at once.' This statute has never been declared invalid, but was cited and approved in Eversole v. Holliday, 123 Ky., at page 503, where it is said:

" 'The purpose of the statute as made manifest by its reading was to prevent the same person from being placed on the ballot in two places—as nominee of the party and by petition.'

"The effect of the Act of 1912 is to prohibit the nomination of any candidate by more than one of the parties subject to its provisions. It is not thought that this is contrary to any constitutional principle. The Constitution embodies limitations upon the power of the Legislature. That instrument in no way curtails the right of the Legislature relative to the manner or methods of nominating candidates for office. In the absence of constitutional limitation, it seems that the Legislature has the inherent authority to legislate on the subject, free from judicial obstruction. In State v. Superior Court, *supra*, the Supreme Court of Washington said:

" 'Political parties being neither mentioned, protected nor favored in the Constitution, a law will not be held unconstitutional, although in its workings it may destroy those organizations.'

"And in State v. Nichols, 50 Wash., 508, 97 Pac., 728; in answer to the argument that the primary law there under consideration would tend to disrupt political parties the same court said:

“ ‘It seems to us this is a political rather than a judicial question, and that an appeal from the legislative decision must be made to the people rather than to the courts.’

“It is no less within the province of the Legislature to enact, without judicial interference, laws tending to preserve the integrity, of political parties. It is said in *Rouse v. Thompson*, 228 Ill., 522; 81 N. E., 1109: ‘The object of holding a primary election by a political party is to select party candidates, and it is too plain for argument that no voter should be permitted to vote at the primary election of a political party unless he is a member of such party, and unless provision is made to prevent persons voting at a primary election for the candidates of a party who are not affiliated with such party, the whole scheme of nominating party candidates by a primary election would fail because of being incapable of execution \* \* \*. The members of the several political parties must be guaranteed by law the right to select their candidates for office with the same freedom as they have the right to choose them after they are nominated, or the primary election at which they vote for candidates is a delusion and a fraud upon the individual voter \* \* \*. “If the independent voter or the voted affiliated with an opposition party can vote at the primary election of a party with which he has no political affiliation, and thereby control the nominations of a party to which he is opposed and whose candidates he will vote against at the polls, the freedom of the primary election is destroyed. What regulations should be had to secure fair primary elections must rest largely with the Legislature, and the courts should not override the discretion placed in that branch of the government by the Constitution, unless it clearly appears that the constitutional rights of the individual voter have been infringed.’ *State v. Superior Court*, 60 Wash., 370, 11 Pac., 233; *Britton v. Commissioners*, 129 Cal., 337; 51 L. R. A., 115; *State v. Flaharty*, 136 N. W., 76, 41 L. R. A., (N. S.), 132; *State v. Curyea*, 138 N. W., 165, 41 L. R. A., (N. S.), 1088.

“We are clear that in the Act of 1902 the Legislature, unrestrained by constitutional restrictions, has not, in so far as the particular matters here involved are concerned, transcended its powers. The questions raised are political, relating wholly to the manner in which the Legislature has exercised its power. With

this the courts have no authority to concern themselves. Were it our province to pass upon the question of the reasonableness or unreasonableness of the regulations prescribed by the Legislature in a matter wholly within its control, we would not pronounce them at all unreasonable; but we consider the Legislature itself more competent to decide that matter.

"It is urged that in requiring the prospective candidate to state in his petition that he supported at the last election the nominees of the party whose nomination he seeks. Sec. 6 offends against Sec. 147 of the Constitution. This argument assumes that Sec. 6 requires the candidate to disclose his vote at the last election. It is provided in Sec. 147, Constitution:

" 'All elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited.'

"The argument might be answered by pointing out that Sec. 6 of the Act does not require the candidate to do more than to say that he affiliated with his party, and 'supported its nominee.' Perhaps that is not equivalent to requiring him to state that he voted for its nominees. But, assuming that it is, it does not necessarily follow that Sec. 6 violates the Constitution. The presumption is always to be indulged in favor of the constitutionality of an act of the Legislature. *Daniels v. Trustees*, 78 Ky., 542. The presumption is always to be indulged that it is not the purpose of the Legislature to infringe the Constitution. *Commonwealth v. International Harvester Co.*, 131 Ky., 551.

"Presuming then that the Legislature did not intend that Sec. 6 should violate the constitutional provision that elections shall be 'by secret official ballot,' we may consider what is meant by this phrase. Under the circumstances, resort to that rule of construction which allows consideration of the prior state of the law and the evil to be remedied is justified. In *Cooley's Constitutional Limitations*, (6 Ed.), 760, it is said of voting by ballot: 'The distinguishing feature of this mode of voting is that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he votes, and thus escapes the influence which, under the system of oral suffrages, may be brought, to bear upon him with a few to overbear and intimidate, and thus prevent the



real expression of public sentiment. \* \* \* The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in position to question his independent action, either then or at any subsequent time.'

"It is said in 15 Cyc, 289, Note 4, with reference to constitutional or statutory requirements as to secret ballots: 'The object of this privilege is to secure the independence of the voter and enable him to express his preference secretly, without being subject to intimidation or being made the victim of ill-will of persecutions on account of his vote.'

"The primary purpose of the secret ballot may, therefore, be taken to be the protection of the voter. It is unanimously held that a voter cannot be compelled to disclose how he voted. It is held in some cases that he may waive his privilege of silence and testify in judicial proceedings. *Dixon v. Orr*, 49 Ark., 238, 4 Am. St. R., 42; *Boyer v. Teague*, 106 N. C., 576, 19 Am. S. R., 547; *Cooley Constitutional Limitations*, (6 Ed.), 763.

"In *Johnson v. Commonwealth*, 90 Ky., 53, it was said by the Court of Appeals of Kentucky: 'The system of voting by ballot is based upon the idea that it makes the action of the voter independent, and to enable him to vote for whom he pleases. No one has the right to examine the ballot of the voter, or to testify as to its contents with a knowledge acquired in any other mode than in the information given him by the voter himself. His ballot, says Mr. Justice Cooley, 'is absolutely privileged, and the veil of secrecy should be impenetrable, unless the voter voluntarily lifts it.'

"In *Commonwealth v. Barry*, 98 Ky., 394, the court held that, in the prosecution of an election officer for falsifying the returns, the testimony of voters as to how they voted was not admissible, the ruling being apparently based largely upon the fact that 'it would be dangerous practice to allow the official action of the officers of the election, watched and inspected as it may be by inspectors, to be contradicted by the parol testimony of the voter.' This was followed in *Major v. Barker*, 99 Ky., 305, a contested election, where it is said: 'It is conceded that the voter cannot be compelled by subpoena to appear and testify how he marked his ballot. If he were permitted to so testify he could then be subjected to a moral compulsion from his party

associates. One party might obtain from willing witnesses testimony which the other party would be powerless to rebut because unable to compel a statement of the truth. It is admitted that injustice may be done in individual cases by the application of this rule, but the consideration mentioned and the evident policy of the law that the secrecy of the ballot should be inviolable outweigh the occasional hardships.'

"In *Tunks v. Vincent*, 106 Ky., 829, a contested election case, it is held on authority that one who has voted illegally is a competent witness as to how he voted and may be compelled to disclose it unless he pleads that he would thereby incriminate himself, a ruling which emphasizes the protecting character of the secret ballot as to legal voters. In these cases questions arising directly out of and intimately involving the conduct of elections were at issue and disclosures by electors of their votes had direct bearing upon the elections themselves. It is not necessary to attempt to say what is meant by the constitutional requirement of a secret ballot; but it is apparent that its spirit does not extend to the point of preventing the Legislature requiring that a candidate for a party nomination shall establish his membership in that party by stating that he voted for its nominees at the last election. This has no connection with the election and is not related to the purpose which evolved the secret ballot nor to the evil it was designed to remedy.

"Finding no infirmity in the Act of 1912, we must sustain the demurrers to the several petitions."

For the reasons indicated in the beginning of the opinion the appeals in the cases of *Chas. T. Gardner v. P. S. Ray* and *Geo. R. Ewald v. P. S. Ray* are dismissed; and the judgments in the cases of *W. S. Tyler, &c. v. P. S. Ray* and *Carl J. Johnson, &c. v. P. S. Ray* are affirmed.

Whole court sitting except Judge Nunn, absent by reason of illness.

**Kentucky Coal and Timber Development Company  
v. Carroll Hardwood Lumber Company, et al.**

(Decided June 20, 1913.)

**Appeal from Breathitt Circuit Court.**

1. **Land—Adverse Possession—Evidence.**—In an action involving title to timber on certain lands, evidence of adverse possession by the defendants' grantors examined, and held sufficient to take the case to the jury, and to sustain a verdict in favor of the defendants.
2. **Land—Adverse Possession—Instructions.**—In an action involving title to timber on certain lands, instructions examined and held properly to present the question of adverse possession.
3. **Land—Timber—Severance—Title—Parol Evidence—Pleading.**—Where a contract for the sale of timber is silent as to its severance from the soil and the time of removal, parol evidence of the intention of the parties is admissible without a plea of forfeiture.
4. **Land—Timber—Severance—Title.**—Where a contract for the sale of timber is silent as to its severance from the soil, the intention of the parties may be shown by parol evidence, and if it appears from the situation of the parties and from the circumstances surrounding them that a severance of the timber from the soil was contemplated at the time of the execution of the contract, the title of the vendee will be defeated unless he cuts and removes the timber from the land within a reasonable time, and a delay of fourteen years will, as a matter of law, work a forfeiture of the title.
5. **Land—Timber—Severance—Time for Removal.**—Where a contract for the sale of timber is silent as to its severance and time for removal, but the parties agree that the vendee is not to cut and remove the timber until a certain land company begins to operate in that vicinity, the vendee has a reasonable time thereafter within which to cut and remove the timber from the land.
6. **Land—Timber—Severance—Title—Instructions.**—Where in an action involving the title to timber, defendants claim the title by virtue of a deed executed fourteen years prior to the bringing of the action, it was error to assume in the instructions that the defendants had title, when there was evidence tending to show that at the time of the execution of the deed a severance of the timber from the soil was contemplated by the parties, and that the defendants had failed to cut and remove it within a reasonable time.
7. **Land—Title—Adverse Possession—Evidence.**—Where plaintiff relies on certain patents and defendants rely on the adverse possession of a remote grantor, it was not error to direct a verdict in favor of plaintiff as to the land covered by his patents, when the evidence failed to show that the defendants' grantor marked out a boundary and entered upon the lands covered by the patents

prior either to the time that the patents were issued or the surveys made.

8. Land—Excluded From the Petition—Peremptory. Instruction—Error.—It is error to direct a verdict in favor of plaintiff for lands excluded by the petition.
9. Land—Patents—Location—Evidence.—Where the evidence of the location of certain old patents is so vague, indefinite and uncertain as to make their location a matter of mere guesswork, it is not error to refuse to submit to the jury the question of their location.

J. J. C. BACH, GRANNIS BACH, McGUIRE & McGUIRE and HAZELRIGG & HAZELRIGG for appellant.

McQUOWN & BECKHAM, O'REAR & WILLIAMS, CHESTER GOURLEY, C. W. CAMPBELL, G. W. FLEENOR and O. H. POLLARD for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing on Original and Cross Appeals.

In the month of February, 1912, plaintiff, Kentucky Coal and Timber Development Company, brought this action against the Carroll Hardwood Lumber Company, U. B. Buskirk and S. M. Croft, partners, composing The Kentucky River Hardwood Company, Harrison Banks, Lex Smith and Miles Smith, its employees, to enjoin them from entering upon or cutting any poplar, walnut, cucumber or ash trees from a tract of land consisting of about 1,200 acres, and located in Breathitt county, Kentucky, on the headwaters of the South Fork of Quick-sand Creek, a tributary of the North Fork of the Kentucky River. The defendants, the Kentucky River Hardwood Company and its owners, Buskirk and Croft, denied the title of plaintiffs, and pleaded title in themselves to certain branded timber situated on the land in controversy. A temporary injunction was asked for and obtained. During the progress of the action plaintiff dismissed as to certain portions of the land included within the boundary set out in the petition, and the question of ownership and possession of the branded trees claimed by defendants was transferred to the ordinary docket for trial by jury. As to the timber on certain portions of the tract described in the petition, the trial court gave a peremptory instruction in favor of plaintiff. The question of ownership and title to the remaining part of the timber was submitted to the jury, and there was a finding in favor of the defendants.

From the judgment predicated on the verdict, plaintiff appeals and defendants prosecute a cross appeal.

The principal chain of plaintiff's title is through a patent for 154,800 acres of land, issued to Stephen G. Ried, June 15, 1872, from which there are excluded 25,800 acres of land theretofore patented and otherwise appropriated. Plaintiff proved his chain of title from Stephen G. Reid, and introduced its surveyor, H. H. Gibson, who testified that there were no patents older or senior to the Reid patent lying within the boundary in controversy except nineteen patents, some of which lie entirely within that boundary, while others lie only partially within that boundary. The following are the nineteen excluded patents:

(1) Benjamin Clemons patent, No. 11,141, for 50 acres, issued June 21, 1848, lying along South Quicksand Creek, at the mouth of Oldhouse Branch.

(2) Benjamin Clemons patent, No. 11,139, for 50 acres, issued \_\_\_\_\_, lying on South Quicksand Creek a short distance above Land Fork.

(3) Benjamin Clemons patent, No. 11,138, dated June 2, 1848, for 50 acres, lying on the South Fork of Quicksand, just below the mouth of Six Mile.

(4) Benjamin Clemons patent, No. 11,140, dated June 2, 1848, for 50 acres, lying on the head of South Fork of Quicksand, just above the mouth of Six Mile.

(5) Combs and Byrne patent, No. 43,139, dated January 1, 1870, for 200 acres, located just west of the old conditional line between Moses Clemons and John Clemons.

(6) Combs and Byrne patent, No. 43,147, issued January 1, 1870, for 20 acres, lying on Oldhouse Branch just above its mouth.

(7) Combs and Byrne patent, No. 43,138, issued January 1, 1870, for 200 acres, lying on Shepherd's Fork of the South Fork of Quicksand, adjoining patent No. 43,137.

(8) Combs and Davis patent, No. 43,343, dated August 8, 1868, for 200 acres, lying on the east side of the South Fork of Quicksand, including the mouth of Five Mile Branch.

(9) Combs and Byrne patent, No. 41,344, dated August 8, 1868, for 200 acres, lying at the head of Road Fork of the South Fork of Quicksand.

Of this land only a small portion of the southwestern corner is included in the land in controversy.

(10) Daniel Duff patent, No. 25,277, issued June 23, 1847, for 50 acres, lying along the South Fork of Quicksand, and just below Boar Hollow.

(11) John Clemons patent, No. 51,702, dated May 1, 1876, for 200 acres, lying on the Laurel Fork of the South Fork of Quicksand.

(12) Moses Clemons patent, No. 41,338, issued \_\_\_\_\_, for a tract of land lying near the head of Two Mile.

(13) John Clemons patent, No. 41,339, issued August 8, 1868, covering a tract of land at the head of Five Mile.

(14) Manford Stacey patent No. 42,855, issued \_\_\_\_\_, covering a tract of land on Five Mile.

(15) George Bradley patent, No. 42,773, issued May 3, 1870, for a tract of land on Six Mile.

(16) M. J. Amix patent, No. 43,142, issued June 27, 1879, for a tract of land lying upon Upper Twin and Lick Branches of Main Quicksand Creek.

A small portion of land lies across the dividing line between Main Quicksand and South Quicksand, within the boundary in controversy.

(17) The John Clemons patent, No. 41,340, issued August 8, 1868, for 100 acres, only a very small portion of which lies within the boundary in controversy.

(18) Isaac Clemons patent, No. 20,774, for 50 acres, now known as the Goff tract, lying on Walnut Cove Branch of Two Mile.

(19) C. B. McQuinn patent, No. 20,785, issued December 29, 1852- for 50 acres, a tract of land lying on Plum Cove Hollow and Cane Patch Branch of Two Mile.

Of the foregoing patented boundaries, Nos. 10, 11, 12, 13, 14 and 15 are expressly excluded by plaintiff's petition. Plaintiff also proved title through the Combs and Byrne patents Nos. 43,137 and 43,138 and dismissed its action as to Combs and Byrne patent No. 43,139. Plaintiff also claimed title under Combs and Davis patents Nos. 41,343 and 41,344. It further appears that Benjamin Clemons, who owned patents Nos. 11,138, 11,139, 11,140 and 11,141, died leaving fifteen children. Plaintiff has acquired by deed the interests of several of these children. Moses Clemons, one of the children, acquired the interests of seven of the children. Plaintiff showed further title to the land in controversy by purchasing from certain heirs and vendees of Moses

Clemons. These purchases, however, were made after the timber thereon had been purchased by defendants.

Defendants claim title to the timber in controversy lying on several tracts of land embraced in the boundary in dispute, by purchase from Hagins and Clark, who purchased the same from Harrison Clemons and from the widow and certain children of Moses Clemons. Defendants also attempted to prove a chain of title through Davis Ross and James Curry, under and by virtue of certain grants made by the Commonwealth of Virginia to Ross and Curry in the year 1788. The court, however, refused to permit the introduction of defendants' title under the Ross and Curry patents. Defendants, therefore, relied on the possessory title of Moses Clemons and his heirs.

As plaintiff owns an undivided interest in the four patents issued to Benjamin Clemons, and defendants own an undivided interest in the timber thereon, the trial court reserved for future determination the rights of the parties under and by virtue of those patents. Of this action of the trial court there is no complaint from either side.

Upon the question of Moses Clemons' possessory title to the main portion of the land, the evidence in substance is as follows:

For some time prior to the civil war, Benjamin Clemons lived on a place known as the "Big Orchard," on the South Fork of Quicksand Creek, some seven or eight miles from the land in controversy. Some time later, having obtained the four patents hereinbefore referred to, he moved to the mouth of Oldhouse Branch. When he first moved to the Oldhouse Branch he made no claim to any of the land except the four patents referred to. Some two or three years later he marked out a boundary on the land lying around the head of South Fork of Quicksand, and the marked boundary enclosing this land is the one now relied upon by defendants. After Benjamin Clemons had been there for a while he extended his clearings up to the Oldhouse Branch. Some time after the close of the war, Moses Clemons, who was then living at Big Orchard, purchased the interests of certain of his brothers and sisters in the lands of Benjamin Clemons, who had died, and moved to the house built by his father at the mouth of Oldhouse Branch. He continued to live there for several years, when the house was burned, and he

then moved further up the creek to the house at the mouth of Land Fork. He resided at the mouth of Land Fork for some eight or nine years, and then moved to the place on Quicksand, leaving his children in possession of his boundary of land. Sometime after Moses entered upon the marked boundary, he extended the clearing made by his father at the mouth of Old Branch up said branch for a distance of about a quarter of a mile. A portion of this clearing was outside of the patent boundary on which Benjamin Clemons' house was located. He also made a clearing on Old Cove on the right hand side of the South Fork of Quicksand, a short distance above the mouth of Old Branch, and enclosed it with a fence. There were several acres in this enclosure outside of the patent boundary. From time to time, as the children grew up and married, he settled them at various places on the boundary. His daughter, who married W. J. Bach, was settled over on Two Mile Creek, and made a clearing on the tract known as the Bedford tract. This tract Moses Clemons afterwards conveyed to his son-in-law and wife in the year 1886. He also made a clearing at the mouth of Shepherd's Fork, at the mouth of Four Mile, and at the mouth of Land Fork, where he lived for a while. There is also evidence to the effect that he made a clearing at the mouth of Five Mile Creek and one on the Road Fork and near the mouth of Six Mile. The evidence further shows the cultivation and use of these clearings within the marked boundary, and that no one had any possession within the marked boundary except Moses Clemons and his children, and those claiming through them. Several witnesses testified that as far back as 1875 the boundary in question was well marked. It seems to have been marked by two or three different instruments. One set of marks appears to have been made with an axe, another with a knife, and still a third with a small hatchet or tomahawk. The timber was marked all around the boundary in question, though in some places the trees marked were as far as 100 or 200 yards apart, where the timber had been cut. Several of the witnesses say that they had gone all the way around the boundary, and that it was well marked. Some of the witnesses testified to having been only on part of the boundary, and that it was well marked. Some of these marks were pretty old, and some looked like they had not been made very long.



For defendants it is shown that at the time it is claimed Benjamin Clemons marked out the boundary in question Isaac Clemons and Charles McQuinn both had patents of land within the boundary, and that James Bradley owned the tract claimed by him, and the witnesses say that Benjamin Clemons never claimed any one of these tracts, though they were included within the marked boundary. A few of the witnesses say that the clearings made by Benjamin Clemons and Moses Clemons did not extend beyond the patents issued to Benjamin Clemons and Moses Clemons, while some of the witnesses say that if the clearings did extend beyond their patent boundaries, it was only to a very small extent. There is also testimony to the effect that the boundary in question was not marked all the way around, and that in some places the marked trees were from thirty yards to a quarter of a mile part.

The court instructed the jury as follows:

“(1) The court says to the jury that they will find for the plaintiff unless they believe from the evidence that Moses Clemons enters upon the land in controversy and outside his patent boundaries, or some parts thereof for at least fifteen years before the ‘entry of the plaintiff, or those under whom it claims, and before the filing of its petition herein, and that he and those claiming under him, used, occupied, controlled and claimed the same or some parts thereof as their own continuously, openly and notoriously for a period of fifteen years to a well defined or marked boundary; and if they so believe they will find for the defendants such land, and the poplar, cucumber and ash trees standing upon such lands as they believe from the evidence they have so held that bears the brands of the letter C or figure 2 and the figure 4 enclosed in a circle.’

“(2) The court instructs the jury that an entry upon the land patented to Benjamin Clemons is not such an entry as is contemplated in instruction No. 1, and that in determining the question as to whether or not Moses Clemons had possession of the land described in the pleadings, they cannot consider any evidence offered by defendants as to the acts of ownership or entries on any of the land made by Benjamin Clemons outside of his patents.

“(3) If the jury believe from the evidence that Moses Clemons entered in the land under Benjamin Clemons, his possession was confined to the patents

made in the name of Benjamin Clemons and the land fenced by the said Benjamin Clemons, unless Moses Clemons entered outside of said patents or enclosures, either by himself 'or tenants, and took possession of other lands, by clearing and fencing, with intention to possess the whole."

Without entering into an elaborate argument of the questions involved, we deem it sufficient to state our conclusions as follows:

(1) There was sufficient evidence that Moses Clemons entered outside of his and his father's patent boundaries upon the land in question, made clearings thereon, and used, occupied and controlled the same or some parts thereof, continuously, openly and notoriously for a period of fifteen years, to a well defined and marked boundary, to take the case to the jury, and we cannot say that their finding in favor of the defendants is flagrantly against the evidence.

(2) The instructions, so far as the question of adverse possession is concerned, properly presented the law of the case. Color of title was not necessary. *New Domain Oil Gas Co. v. Gaffney Oil Co.*, 134 Ky., 792. Of course Moses Clemons could not acquire title against a superior title holder by merely occupying either his or his father's patents and claiming beyond his patent boundary, but if he entered upon the land outside of his patent boundary, made clearings thereon, and used, occupied and controlled the same, claiming to a well defined or well marked boundary, continuously, openly and notoriously for the statutory period, he thereby acquired title by adverse possession.

(3) Defendants purchased the trees in question from the vendees of Hagins & Clark. In the deed the trees are described as being branded with the letter "C" or with the figure "2." The trees were of merchantable size. Hagins & Clark were engaged in the logging business. Some of the parties say that the trees were to be removed in three years; others that they were to be removed in five years. Hagins testified as follows: "We did not buy it (the timber) to have it taken out at that time, and we could not have had it taken out then without loss. It was a speculation, and we also had a verbal contract with the parties that we were not to deliver it at that time, not until somebody else could do something to help us; not until the Kentucky Union Land Company commenced to operate on the lower end

so as to help us get it out." Clark testified that they did not buy the timber with the intention of logging it themselves, but with the understanding that they might remove it whenever they came in with the Kentucky Union Company, so that the latter might help them fix the creek. It is the law in this State that where the contract itself fixes no time within which the timber sold or reserved is to be removed, the intention of the parties may be ascertained from facts outside the agreement, such as the situation of the parties and the circumstances surrounding them at the time the contract is executed. *Hicks, et al. v. Phillips, et al.*, 146 Ky., 305. In the same case it is held that where the grantor in a deed conveying land, reserves the timber on a specified part of the land, and the deed is silent as to the time of the removal, and there is nothing in the stipulations of the contract or in the situation of the parties or of the circumstances surrounding them at the time the contract was executed to show that a severance of the timber from the soil was contemplated, the title to the timber specified remains in the grantor, and is not lost or defeated by failure to cut and remove the timber within a reasonable time. Manifestly the converse of the latter proposition is true; that is, if the situation of the parties and the circumstances surrounding them at the time the contract is executed are such as to show that a severance of the timber from the soil was contemplated, the title thereto may be defeated by a failure to cut and remove the timber within a reasonable time. In this case there were several circumstances tending to show that a severance of the timber from the soil was contemplated by the parties. We, therefore, conclude that the question whether or not a severance of the timber from the soil was contemplated by the parties should have been submitted to the jury. To justify the introduction of the evidence on this question, and the submission thereof to the jury, no pleading on the part of the plaintiff, alleging a forfeiture of the timber by reason of the failure of the defendants to cut and remove it within a reasonable time, was necessary. Plaintiff, claiming title to the land, sought to enjoin the defendants from cutting the timber. Defendants denied plaintiff's title, and asserted title to the timber. A question of title being involved, it was competent for plaintiff to introduce evidence tending to show a want of title on the part of the defendants. But it is insisted that the error of the trial

court in refusing to instruct the jury on this question is not available on this appeal, because plaintiff offered an instruction on the question and did not make the refusal of the court to give it a ground for a new trial. This is true, but plaintiff did except to the instructions given by the trial court, and allege the giving of erroneous instructions as a ground for new trial. The instructions actually given, while correct so far as the question of adverse possession is concerned, assumed, as a matter of law, in the face of evidence tending to show that a severance of the timber was contemplated by the parties, that defendants acquired and retained title by purchase from the vendees of Hagins & Clark. In this respect, therefore, the instructions given are erroneous. If, as a matter of fact, a severance of the timber from the soil was contemplated by the parties, then Hagins & Clark and their vendees had only a reasonable time within which to cut and remove the timber, and their failure to cut and remove it within fourteen years after the conveyance thereof is, as a matter of law, a failure to cut and remove it within a reasonable time. In that event, therefore, they have lost title to the timber in question. On the other hand, if it was agreed between the parties that the timber was not to be cut until the Kentucky Union Land Company commenced to operate on the lower end of the land so as to assist the defendants in getting out the timber, then the defendants had a reasonable time thereafter within which to cut and remove the timber. It not appearing exactly when the Kentucky Union Land Company did commence to operate, the question whether or not the parties did agree as indicated, and whether or not the defendants failed to cut and remove the timber within a reasonable time after the Kentucky Union Land Company did commence to operate, was for the jury.

On a return of the case the court will qualify instruction No. 1 by adding the words "unless you believe as in instruction No. 4," and will give in substance the following instruction, numbered 4:

Although you may believe from the evidence as set out in instruction No. 1, yet if you further believe from the evidence that at the time of the execution of the deed from the heirs of Moses Clemons to Hagins & Clark in the year 1898, the parties thereto contemplated a severance of the timber from the soil, you will find for the

plaintiff; or if you believe it was agreed at the time by the parties that the timber was not to be cut and removed until the Kentucky Union Land Company commenced to operate on the lower end of the land so as to assist defendants in getting out the timber, and that the Kentucky Union Land Company did commence to operate on the lower end of the lands, and that the defendants failed to cut and remove the timber within a reasonable time thereafter, you will find for the plaintiffs. But if you believe as set out in instruction No. 1, and further believe from the evidence that at the time of the execution of the deed from the heirs of Moses Clemons to Hagins & Clark a severance of the timber from the soil was not contemplated by the parties, or if you believe from the evidence that it was agreed by the parties that the timber was not to be cut until the Kentucky Union Land Company commenced to operate on the lower end, and after it so commenced to operate, if it did so, the defendants did not fail to cut and remove the timber within a reasonable time, you will find for the defendants.

### CROSS APPEAL.

(1) It is insisted that the court erred in peremptorily instructing the jury to find for plaintiff as to the lands embraced in Combs and Byrne patent No. 43,138, Combs and Davis patents Nos. 41,343 and 41,344, and M. J. Amix patent No. 41,342. In this connection it is argued that Moses Clemons marked a boundary embracing these patents, and extended his clearings over on the land covered by them prior to the time that the surveys were made or the patents issued. The patents were issued in the year 1870, on surveys made during the year 1868. One or two witnesses say that Moses Clemons moved to Oldhouse Branch some time after the war. The exact time is not definitely fixed. On the other hand it appears that Moses sold to his brother a tract of land by deed dated November 23, 1868. This tract of land covers Big Bottom, the place where Moses lived prior to moving to the residence of Benjamin Clemons. The deed, after describing the land, recites "being the same land where Moses Clemons at present lives." It is certain, therefore, that Moses Clemons did not move to the Oldhouse Branch until after that date. Furthermore, the precise time when he began to extend his clearings beyond his father's patents, and

began to claim to a marked boundary, does not satisfactorily appear from the evidence. It does appear, however, that in the year 189—, in a suit to partition the lands of Benjamin Clemons, Moses Clemons recovered judgment against his brothers and sisters for the land now in controversy. In that case he must have relied altogether on his own claim of adverse possession, and not upon any adverse possession on the part of his father. As a matter of fact his father did not have a marked boundary or clearings therein for the statutory period of fifteen years. Moses Clemons' claim to the land, therefore, depends upon when he began to hold adversely to his brothers and sisters. There is no satisfactory evidence in the record that he occupied any portions of the land embraced by the patents in question, claiming them to a well marked boundary, either prior to the patents or the surveys on which they are based. We, therefore, conclude that the trial court properly directed the jury to return a verdict in favor of the plaintiff for the land embraced by the patents in question, with the exception of that part of the Combs and Davis patent No. 41343, covered by the 5th exclusion mentioned in plaintiff's petition. In the petition, plaintiff expressly excludes certain lands. The Combs and Davis patent No. 41343 covers a part of the 5th exclusion. Therefore, the court erred in directing a verdict in favor of plaintiff for all the lands covered by that patent. The verdict should have been confined to that part of the patent not embraced within the 5th exclusion.

(2) The next question involves the propriety of the court's action in excluding from the consideration of the jury evidence tending to show that two of the Ross and Curry patents covered the land in controversy. The patents in question are a part of a large number of surveys made by one George Hart as deputy surveyor of Fayette county, and later of Bourbon county, Kentucky, in the years 1786, 1787 and 1788. Certain of these patents call for "Remarkable Long Rock House on Buckhorn."

Basing their arguments on the fact that in the original description of certain of the patents, the word "Troublesome" was erased and the word "Buckhorn" written over it, and the fact that all the surveys could not be placed on Buckhorn, and that there was no Remarkable Long Rock House on Buckhorn and there is one

on Troublesome, it is contended that these facts, together with others relied on, were sufficient to justify the location of these patents as contended for by defendants. As a matter of fact, however, the patents which it is contended cover the lands in controversy have no fixed corners. In order to place them so as to cover the lands in controversy, all of the Ross and Currie patents have to be located and placed with respect to each other. It is impossible for us, within the limits of a reasonably short opinion, to consider the arguments pro and con on the location of these patents, as contended for by defendants. The same contention was made in the case of *Taulbee v. Buckner's Admr.*, 91 S. W., 734, and on a consideration of the question, the contention was held without merit. While ordinarily the location of a patent is for the jury, yet the evidence of its location must be of a kind tending to induce conviction. In this case the evidence is vague, indefinite and uncertain. At most it presents a theory altogether at variance with certain well established facts, and after all, is a matter of guess-work entirely. Long ago it was held that in no court ought a doubtful title prevail against a clear one. *Preston's Heirs v. Bomar*, 2 Bibb (Ky.), 493. Certainly, one with a good title should not have his rights guessed away.

Judgment reversed both on original and cross appeal, and cause remanded for a new trial consistent with this opinion. In the meantime the injunction will be continued in force.

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### **Pack v. Camden Interstate Railway Company.**

(Decided June 20, 1913.)

#### **Appeal from Boyd Circuit Court.**

1. **Street Railroads—Personal Injury—Instructions.**—It is error to give an instruction so general and abstract in form as to make the jury the judges of both the law and facts.
2. **Trial—Setting Aside Verdict—New Trial—Discretion of Judge.**—A judgment setting aside a verdict and awarding a new trial will not be reversed unless it appears that there was an abuse of discretion on the part of the trial court.

C. B. WHEELER for appellant.

HAGER & STEWART for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

On November 23, 1906, plaintiff, H. J. Pack, was injured while attempting to alight from a street car owned and operated by defendant, the Camden Interstate Railway Company, and brought this action against the defendant to recover damages. Two trials were had. On the first trial the jury returned a verdict in favor of plaintiff in the sum of \$350. A new trial was granted, and on the second trial the jury found for the defendant. From the judgment predicated on the verdict plaintiff appeals, and brings up the record of the first trial for the purpose of having reviewed the action of the trial court in awarding a new trial.

Plaintiff was a passenger, and while attempting to alight from the car on which he was riding at 21st Street in Ashland, Kentucky, fell and was injured. He bases his right to recover on the fact that the car stopped at 21st Street, and while he was in the act of getting off, the defendant negligently started the car without giving him a reasonable opportunity to get off. The allegations of the petition were denied by answer, and the answer further alleged that while the car was in motion, and before it was stopped or could have been stopped at 21st Street, plaintiff attempted to alight therefrom, and that this negligent act on his part was the sole cause of the injuries for which he sued.

The evidence on each trial is practically the same. According to plaintiff's evidence, he, on the payment of his fare, requested the conductor on the car to stop the car at 22nd Street. As the car approached 22nd Street, plaintiff started towards the door of the car to get off. The car did not stop there. Plaintiff, while still standing, asked the conductor to stop the car at 21st Street. The car stopped there. Mr. Nichols, who was with plaintiff, first got off the car in safety. While the car was still standing, plaintiff attempted to get off. While on the steps and in the act of getting off, the car suddenly started without giving him a reasonable opportunity to alight. Plaintiff was thrown from the car steps to the pavement and injured. Some three or four witnesses testified to these facts. On the other hand, several witnesses testified that plaintiff got off the car while it was in motion and before it was or could be stopped at 21st Street.



On the first trial the court, by instruction No. 1, told the jury in substance that it was the duty of the defendant, its agents and servants in charge of the car on which plaintiff was riding as a passenger, to exercise the utmost care for plaintiff's safety, and that if they believed from the evidence that they failed to observe such care and by reason thereof plaintiff was injured, the law was for plaintiff and the jury should so find, unless they believed from the evidence that plaintiff was guilty of contributory negligence as defined in instruction No. 3. On the second trial the court, in lieu of instruction No. 1, told the jury that if they believed from the evidence that the car was stopped at 21st Street for the purpose of allowing passengers to alight therefrom, and while it was stopped, plaintiff, while exercising ordinary care for his own safety, attempted to alight therefrom, and the car was started in motion before plaintiff had a reasonable opportunity to leave the car, and he was thereby injured, they should find for the plaintiff. The first part of Instruction No. 2 given on the second trial is the usual instruction on contributory negligence. In addition to this instruction, the court further told the jury that if they believed from the evidence that plaintiff, on the occasion in question, attempted to alight from the defendant's car before it arrived at or reached 21st Street, and while said car was in motion, they should find for the defendant.

The trial court being of the opinion that the weight of the evidence was in favor of the defendant, and that the instructions given on the first trial did not properly present to the jury the issues to be tried, granted a new trial.

It is insisted that the court erred in granting a new trial. It is evident that instruction No. 1 given on the first trial is so general and abstract in form as to make the jury the judges of both the law and the facts. An instruction in that form has been frequently condemned by this court. *I. C. R. R. Co. v. Dallas' Admx.*, 150 Ky., 442; *L. & N. R. R. Co. v. King*, 131 Ky., 351; *Smith v. Cornett*, 38 S. W., 689, 18 Ky. L. Rep., 818; *C. N. O. & T. P. Ry. Co. v. Hill's Admr.*, 89 S. W., 523, 28 Ky. L. Rep., 530; *L. & N. R. R. Co. v. Crutcher*, 135 Ky., 381; *Western Ky. Coal Co. v. Davis*, 138 Ky., 669; *Citizens Trust & Guaranty Co. v. Ohio Valley Tie Co.*, 138 Ky., 421; *Johnson, et al. v. Westerfield's Admr.*, 143 Ky., 10. The error indicated was alone sufficient to justify the

granting of a new trial. Furthermore it is the well settled rule of this court not to reverse a judgment setting aside a verdict and awarding a new trial unless it appears that there is an abuse of discretion on the part of the trial court. *Chenoa-Hignite Coal Co. v. Philpot's Admr.*, 152 Ky., 385; *Floyd v. Paducah Ry. Co.*, 23 Ky. L. Rep., 1077; *Miller v. Ashcraft*, 98 Ky., 314; *Brown v. L. & N. R. R. Co.*, 144 Ky., 546; *Wilhelm v. Louisville Ry Co.*, 147 Ky., 196. After a careful consideration of the record, we conclude that there was no abuse of discretion in this case.

But it is insisted that the court erred in its instructions on the second trial. The issue in the case was sharply drawn. The question was: Was plaintiff injured by reason of defendant's failure to afford him a reasonable opportunity to alight from the car after the stop at 21st Street, or was he injured while attempting to alight from the car while the car was in motion, and before it reached 21st Street? If the former, he was entitled to recover; if the latter, defendant was not liable, because plaintiff's injuries were not the result of any negligence on its part. *Central Kentucky Traction Co. v. Combs*, 143 Ky., 529. The instructions given on the second trial properly presented these two issues. It would have been error not to present defendant's side of the case.

Finding no abuse of discretion on the part of the trial court in setting aside the first verdict, and perceiving no error on the second trial prejudicial to the substantial rights of plaintiff, the judgment is affirmed.

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### **Theo. Lewis, Clerk v. Bullock.**

(Decided June 20, 1913.)

#### **Appeal from Fayette Circuit Court.**

**Elections—Primary Elections—Appeal.**—No appeal lies to this court from a decision of a circuit court directing a county clerk to accept as sufficient a petition nominating a person as a candidate in a primary election.

HUNT, BULLOCK & HUNT, KIMBALL & HUNTER and GEO. R. HUNT for appellant.

JOHN R. ALLEN for appellee.

## OPINION OF THE COURT BY JUDGE CARROLL—Dismissing Appeal.

The appellee, a candidate for the office of County Superintendent of Common Schools in Fayette County, presented a petition to the Clerk of the Fayette County Court, nominating her as a candidate for this office in the primary election to be held in August. The petition, omitting the women who signed it, did not contain the requisite number of qualified electors, although if the women who signed the petition have the right to vote for candidates for the office of County School Superintendent, the petition did contain the required number of names. The Clerk of the County Court being doubtful of the right of women to vote for candidates for this office, declined to recognize the validity of the petition, and thereupon the appellee instituted mandamus proceedings in the Fayette Circuit Court. That court decided that women had a right to vote for candidates for this office and therefore had the right to sign the petition of appellee as a candidate before the primary and entered a judgment directing the clerk to receive the petition of the appellee and put her name in the list of candidates for this office at the primary election. From this judgment, the clerk, in order to have the question of the right of women to vote for County School Superintendent decided and his duties defined, has prosecuted this appeal.

In the opinion in the case of Hager v. Robinson, this day handed down, we decided that under section 27 of the primary election law no appeal lies from the decision of a circuit or county court or judge thereof on questions similar to the one presented in this case. The reasons for so ruling are fully stated in the opinion referred to, and it is not necessary to repeat them here. It is, however, to be regretted that the much disputed public question of the right of women to vote for the office of County Superintendent of Schools cannot be definitely settled in this case, but as we have no jurisdiction of the appeal, it would be obviously out of place to consider the question.

The appeal must be dismissed for want of jurisdiction, and it is so ordered.

**Keith Company v. Hummel.**

(Decided June 20, 1912.)

**Appeal from McCracken Circuit Court.**

**Attachment—Discharge—Evidence.**—On a motion to discharge an attachment, evidence examined and held to show that the defendant so concealed himself that summons could not be served upon him, and that the court erred in discharging the attachment.

**EATON & BOYD** for appellant.

**MILLER & MILLER** for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY,**  
**COMMISSIONER—Reversing.**

In the month of March, 1912, plaintiff, George F. Keith Company, a corporation organized under the laws of the State of Massachusetts, sold and delivered to defendant, L. Hummel, certain goods and merchandise at the price of \$438.13. The account not being paid, it was sent to the law firm of Eaton & Boyd for collection. On October 16, 1912, they brought suit against the defendant, and on the 18th day of October took out a general order of attachment, based on an affidavit alleging that the defendant had left the county of his residence, to-wit: McCracken county, to avoid service of summons; and (2) that he so concealed himself that summons could not be served on him. Another ground was relied on, but was defectively stated in the affidavit.

On January 6, 1913, defendant filed an answer and affidavit controverting the grounds of the attachment. On January 8th, he entered a motion to discharge the attachment, and filed notice of the motion which had been served on plaintiff's attorneys on the previous day. The hearing of the motion was continued until January 10th. Plaintiff filed a motion for a continuance. The motion was overruled, and the court, after hearing evidence, gave judgment in favor of plaintiff for the amount of its claim, with interest, but entered an order discharging the attachment. Plaintiff appeals.

The evidence bearing on the grounds of attachment is, in substance, as follows: Defendant testified that Mr. Boyd had been pushing him very hard about the claim. At that time his mother was very sick, and he had to go to Chicago. He left for Chicago on the 8th or 9th of October. He stayed there three or four days.

When he left Chicago his intention was to go to Guthrie to get the money. He went to Guthrie to see if his father-in-law would not let him have the money. His father-in-law was a wealthy man. From Guthrie he went to Louisville to see his brother-in-law, who was also wealthy, to get him to pay half the debt. While he was in Louisville he was doing nothing. While there he got a telegram that his store had been closed up. Did not know anything about when court began, and did not know he was going to be sued. On cross examination he stated that he promised to pay Mr. Boyd between the 10th and 25th one-half, and ten days later the balance. He did not tell Mr. Boyd that he was going away. He told the clerks to tell Mr. Boyd that he would be back between the 10th and 25th. On the 16th of October he was in Louisville. On the 17th and 18th he was in Louisville. When he got the telegram that his store had been closed up he left Louisville on the four o'clock train Saturday morning. Mr. B. M. Philley, who had several large claims against defendant, testified that he asked defendant if he had any relatives from whom he could borrow. Defendant said possibly his father-in-law or brother-in-law might loan him the money. Philley suggested that his wife go to see them. Defendant said she could not go as the baby was not well. Philley then suggested that defendant go. A day or two later Philley called and defendant was gone. Defendant's stock was worth between \$7,000 and \$8,000. On cross examination witness stated that at the time he had this conversation it was between the 1st and 10th of the month of October. He had four claims against defendant, one for \$1,100, one for \$700 and two small ones.

Ex Mason, a clerk in defendant's store, testified that defendant told him a few days before he left that he had to raise some money, and he spoke several times of going to see his father-in-law. On the 8th or 9th defendant told witness that he was going away and did not know when he would return. His purpose was to raise the money. On cross-examination witness stated that he did not know where defendant was, but only knew where defendant told him he was going.

For plaintiff Mr. A. E. Boyd, an attorney at law, who had the claim for collection, testified that he received the claim the latter part of September. He had several conversations with defendant about it in

his office and at defendant's store. Defendant promised to pay half of the claim on the 10th day of October, and said he would pay the balance on the 20th. Witness told him that the people he represented were anxious for the claim to be paid or for suit to be filed; that if defendant would pay the claim before the October term of the court it would be satisfactory. Defendant said he would pay half on the 10th and try to arrange for the balance before court. This conversation took place the latter part of September or the first part of October. On October 10th he went to see defendant. Defendant was gone and no one could tell him where he was or when he would be back. He afterwards went to defendant's store on several occasions and was informed by his brother-in-law that he did not know when defendant would return. On the 18th his brother-in-law said that plaintiff had gone away to raise the money, and would be back in a day or two if he could raise it; but if he could not raise it he did not know when he would be back. Thereupon, witness had the attachment issued. The deputy sheriff in whose hands the summons against defendant was placed for service was called, and it was then admitted by the parties that the deputy sheriff looked for the defendant on the 16th and 18th, but could not find him.

In rebuttal Hummel testified that Mr. Boyd did not mention to him anything about when court began, and witness did not know when court did begin. He had only been living in Paducah since March 1. He denied that Mr. Boyd told him that unless he paid the account he would be sued. He told Mr. Boyd that he would pay the money by the 10th or 25th.

Mr. Boyd further testified that defendant said that he would pay on the 10th, and that he then told the defendant that he would have to pay the other half before court convened.

We deem it unnecessary to pass on the question of continuance, in view of the conclusion of the court in regard to the order discharging the attachment.

The question is: Did defendant leave McCracken county to avoid the service of summons, or did he so conceal himself that summons could not be served upon him? Counsel for defendant contend that the evidence fails to establish either of these facts. On the contrary, it is insisted that the weight of the evidence is to the effect that defendant was absent from the county in a

*bona fide* attempt to secure money for the purpose of paying the debt. In this connection we are referred not only to the statements of defendant, but the evidence of Mr. Philly, who says that he advised defendant to see his father-in-law and brother-in-law. Defendant's conduct, however, must be judged in the light of all the attendant circumstances. According to plaintiff's evidence, he agreed to pay half the money on the 10th, and the balance before court convened. According to defendant's evidence, he was to pay half of the claim between the 10th and 25th of October, and the balance within ten days. The next term of the McCracken Circuit Court was approaching. The last suing day for that term was October 18th. Defendant was heavily in debt. He was being pressed not only by plaintiff but by other creditors. On the day before he was to make a payment on the debt in question he left the county. He says that he went to Chicago to see his mother who was sick. He remained there three or four days. From there he went to Guthrie to see his father-in-law. He then returned to Louisville. He was in Louisville on the 16th, and according to his own statement, he was then doing nothing. He says that his father-in-law and brother-in-law were to meet him in Paducah on October 21 and arrange for the payment of his debts. This arrangement had been consummated. Even if it had not been it would not have taken long to consummate it. There was nothing to prevent him from returning to Paducah on the 17th. As a matter of fact, he did not return until the 19th, when it was too late to serve him with process. Though we give full effect to his and Mr. Philley's statements in regard to his leaving Paducah for the purpose of getting money to pay his debts, the fact nevertheless remains that he stayed away too long. He gives no good reason why he should not have returned sooner. Here, then, we have a case where a merchant heavily in debt agrees to make a payment to one of his creditors on the 10th day of the month. He leaves on the day before, without advising his creditor's attorney of his intention to leave. Though claiming he was gone for the purpose of borrowing money to pay his debts, he nevertheless remains away after he has arranged to secure the money. Not only so, but he manages to stay away until it is too late to serve him with process for the ensuing term of court. In our opinion, the evidence clearly shows that he was so conceal-

ing himself that summons could not be served upon him. It follows, therefore, that the trial court erred in discharging the attachment.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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### **O'Kelly, et al. v. Lockwood, et al.**

(Decided June 20, 1913).

#### **Appeal from Boyd Circuit Court.**

1. **Public Roads—Contract to Keep in Repair—Order of Fiscal Court Directing County Attorney as Commissioner to Make Contract to Maintain Roads—Void Contract—Attempted Ratification of.**—The fiscal court has no power to delegate to an agent the authority to do anything which involves the exercise of a discretion which by law is confided to it, and where a fiscal court by an order directed a commissioner to make a contract for maintaining public roads, which order contemplated the exercise of his own judgment and discretion, it was void. Nor could the fiscal court delegate authority to the commissioner to approve the bond of the contractor, for the acceptance of the bond necessarily involves a discretion. The only way in which the fiscal court can act is through its orders duly recorded in the manner provided by law.
2. **Fiscal Courts—Power to Validate and Ratify Void Contract.**—The contract attempted to be made by a special commissioner with a contractor for the maintenance of the public roads of the county was one which was within the power of the fiscal court to make, and the fact that its agent did not take the required steps to make it a binding obligation, does not deprive the governing body of the county of the power to thereafter validate and ratify it so as to make it binding from the beginning, and the attempt upon the part of the fiscal court to carry out the contract attempted to be made by its commissioner will be treated as a ratification of his acts, and make the contract relate back to the original transaction.

DINKLE & PRITCHARD and J. J. MONTAGUE for appellants.

LABAN T. EVERETT, JOHN F. COLDIRON for appellees.

#### **OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

After due advertisement, the fiscal court of Boyd County at its April term, 1912, opened bids for the working and keeping in repair of the roads for two years, under the provisions of section 4315 of the Kentucky



Statutes; the appellant, O'Kelly, being the lowest bidder, was awarded the contract.

On the second day of April, 1912, the following order was entered:

"Bids opened for the maintenance of roads of Boyd County and contract awarded to John O'Kelly, his bid being the lowest, \$21.85 per mile."

At the same term, and on the fourth day of April, the following order was entered.

"Ordered that F. C. Malin, County Attorney, be and he is hereby appointed a commissioner to make contract and take bond of John O'Kelly in the matter of maintaining roads of Boyd County."

Thereafter, and on the eighth day of April, Malin as commissioner attempted to enter into a contract with appellant for and on behalf of the Boyd County Fiscal Court under his supposed authority, and at the same time undertook to accept from appellant, O'Kelly, a bond for the faithful performance of his contract as provided by section 4315. These papers were subsequently filed with the county court clerk, but neither of them were ever reported to the fiscal court of Boyd County, or approved or ratified by any order of that court. O'Kelly assuming that he had a valid contract with the county proceeded at once to make sub-contracts, to buy machinery and to have the work done.

In August, 1912, appellees, residents and taxpayers of Boyd County, conceiving the paper so signed by O'Kelly and Malin to be void and of no binding effect upon the county, instituted this action against O'Kelly, the county judge, members of the fiscal court, and other county officers, seeking to enjoin them from proceeding under the contract, or paying to O'Kelly or any of his sub-contractors any money thereunder.

Pending the action, and on the second day of September, 1912, the Boyd County Fiscal Court entered an order reciting the fact that it had in open court on the second day of April, 1912, opened the various bids and considered the same, and found O'Kelly to be the lowest and best bidder, and that O'Kelly's bid was a bid of \$21.85 per mile per year for each of the years of 1912 and 1913, and that same had been accepted and approved by the court, and that the same term it had appointed Malin its commissioner to draft and enter into a written contract with O'Kelly on behalf of the county in accordance with the specifications already on file, and that it

had directed him (Malin) to embody in said contract that O'Kelly was to receive \$21.85 per mile for each of the said years, but that Malin by mistake so drew said contract that O'Kelly was to maintain and keep in repair the said roads for the years 1912 and 1913 for the sum of \$21.85 per mile; and for the purpose of correcting said contract and supplying the orders of the court in regard thereto, and correcting them, it appointed another special commissioner for and on behalf of the county and the fiscal court to correct and amend said contract so as that it might conform to the specifications and with the terms of O'Kelly's bid.

On the 6th day of September, the said fiscal court entered the following order.

"This day came C. L. Williams, Commissioner, acting in behalf of Boyd County to make corrected contract with John O'Kelly for maintenance and repair of the graded dirt roads in Boyd County, Kentucky, and produce said corrected contract, duly signed and executed by C. L. Williams, Commissioner aforesaid, and said John O'Kelly, which contract was read in open court and upon motion duly seconded and carried, it is ordered that said corrected contract be and the same is hereby accepted and approved and ordered filed, and it is further ordered that the bond offered by said John O'Kelly, duly executed by himself as principal and the Maryland Casualty Co. as surety, for the faithful performance of said contract this day executed, be and the same is hereby accepted and approved and ordered filed."

Upon the filing of the original petition the clerk issued a temporary restraining order which upon final hearing was made perpetual by the circuit court, and from that judgment this appeal is prosecuted.

The record presents two questions:

(1) Did the original writing signed by Malin, the commissioner acting for the county, and his approval of the bond executed by O'Kelly, make a binding contract between O'Kelly and the county?

(2) Did the subsequent action of the fiscal court have the effect to cure any defects in the original contract or in the manner of its execution, and thereby ratify the acts of its agent attempted to be performed for it,

(1) The fiscal court has no power to delegate to an agent the authority to do anything which involves the exercise of a discretion which by law is confided to it, and if the orders of the court directing the commissioner to

enter into the contract with O'Kelly involved any such discretion upon the part of the commissioner, or confided to him the doing of anything which necessitated the exercise of his judgment, then they are void. The order directing Malin as commissioner to make the contract, and take the bond of O'Kelly was indefinite and vague as to the powers conferred upon the commissioner; it neither referred to the bid of O'Kelly, nor to the plans and specifications under which that bid was made; it did not direct the terms upon which the contract was to be made, nor did it indicate the nature or amount of the bond which he was to take and accept. Under the terms of that order the action of the commissioner necessarily contemplated the exercise of his own judgment and discretion about these matters, and, was, therefore, void. *Floyd County v. Oswego Bridge Co.*, 143 Ky., 693; *Kazee v. Commonwealth*, 139 Ky., 66; *Milliken v. Gillem*, 135 Ky., 280.

But even if this were not so, under the express terms of section 4315 of the Kentucky Statutes, it is the duty of the fiscal court itself to approve the bond of the contractor, and it has no authority to delegate that right to another. The only way in which the fiscal court of a county can act is through its orders duly recorded in the manner required by law; and even if the orders of the court had been drawn so as to leave no discretion in the commissioner as to the character of the contract to be entered into with O'Kelly, still the fiscal court could not have delegated to him the authority to approve the bond. The acceptance of the bond necessarily involved the exercise of a discretion; but if it did not that power rested under the statute solely with the fiscal court, and its approval could be made in no event by any other person or body, or in any manner except by an order duly entered on its record.

(2) But it is clear from the record that the fiscal court and O'Kelly were in the first place each acting in good faith, and that they each thought they had entered into a binding obligation; and the question remains, under these conditions had the fiscal court the power by subsequent orders to correct its oversights and errors previously made in its effort to enter into this contract, so as to ratify its original action and that of its commissioner, and make the contract relate back to the original transaction and be binding,

The orders of September, 1912, of the fiscal court evidence an unmistakable desire upon its part to take such

steps as would make binding the original attempted contract with O'Kelly. The original attempt was futile; the requirements of the law were not followed, and it was manifestly the purpose of the fiscal court to take such steps as would make binding that which it had previously attempted to do. Whether public or quasi-public corporations may subsequently ratify void efforts of their agents made in good faith under their orders to enter into contracts is not an open question. In the case of *Montgomery County v. Taylor*, 142 Ky., 547, the Menifee County Fiscal Court had previously appointed its commissioners to treat with the Montgomery County Fiscal Court as to the settlement of a tax claim which Montgomery County had against Menifee County. The commissioners so appointed by Menifee County met a similar body from Montgomery County and entered into a written settlement of the controversy, and made a written report to the fiscal court of Menifee County; but that report was never in terms ratified or approved by the Menifee Fiscal Court. But subsequently the Menifee Fiscal Court did enter such orders and take such steps as to show an intention upon its part to carry out the compromise so made by its commissioners, and this court in treating the subsequent orders and acts as a ratification said:

"While the order of August 14, 1893, does not in terms approve the action of the Menifee commissioners, the action of the Menifee County Court in referring to the original appointment of the commissioners in setting forth the fact that these commissioners had come to terms with the Montgomery County commissioners, in setting out the territory in Menifee County, and in levying a tax thereon and appointing a collector to collect the same, cannot be construed in any other light than as an act of ratification."

In that case the contract was held to have been ratified by subsequent orders and conduct although there was no ratification in terms, whereas in this case there is *express* subsequent ratification. The contract attempted to be made in the beginning was one which was within the power of the fiscal court to make, and the fact that its agent did not take the required steps to make it a binding obligation, does not deprive the governing body of the county of the power to thereafter validate and ratify that contract so as to make it binding from

the beginning. (Page on Contracts, Vol. 2, Sections 1063 and 1064).

For the reason indicated the judgment is reversed, with directions to enter a judgment in conformity herewith.

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**Cincinnati, New Orleans & Texas Pacific Railway  
Company v. Rankin.**

(Decided June 20, 1913.)

**Appeal from Boyle Circuit Court.**

**Carriers—Shipment of Livestock—Injury to Stock—Action for—Measure of Damages.**—Ordinarily the measure of damages where stock is injured in shipment is the difference between their market value just before and after the injury. This rule, however, contemplates that the injured stock shall be delivered to the plaintiff.

CHARLES H. RODES, NELSON D. RODES, GEORGE E. STONE  
and JOHN GALVIN for appellant.

CHARLES C. FOX for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—**Extending Former Opinion and Over-  
ruling Petition for Rehearing.

In our former opinion, which may be found in 153 Ky., 730, we used the following language:

“Should it turn out that the agreement limiting defendant’s liability to \$75 per head was obtained by fraud or deceit, then the ordinary measure of damage will apply, with the exception that the court must take into consideration the fact that the defendant is liable for the proceeds of the sale of the injured stock retained by it, less the expense of sale and the reasonable cost of the keep of the stock from the time of their injury.”

For the purpose of making clear what is intended by the foregoing language, we deem it necessary to say that ordinarily the measure of damages where stock is injured is the difference between their marked value just before and after injury. This rule, however, contemplates that the injured stock shall be delivered to the plaintiff. To apply that rule without qualification to the facts of this case would work an injustice to the

plaintiff, for the defendant, after a tender of the stock and a refusal on the part of the plaintiff to receive them, sold the stock and retained the proceeds of the sale. In this case, therefore, plaintiff, under the circumstances indicated, is entitled to recover the difference between the market value of the stock just before and after the injury, and in addition thereto the proceeds of the sale of the injured stock less the expense of sale and the reasonable cost of their keep from the time of their injury.

The opinion is extended in the manner indicated, and the petition for rehearing is overruled.

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### **Standard Oil Company of Kentucky v. Watson.**

(Decided June 20, 1913).

#### **Appeal from Bourbon Circuit Court.**

1. Master and Servant—Injury to Servant While Engaged in Tearing Down Old Building—Duty of Inspection.—The law does not impose upon the master engaged in the hazardous work of tearing down an old building the duty of inspecting it so that his workmen may have a safe place to work, and in an action by a servant who was injured from the breaking of a beam upon which he was standing while engaged in tearing down an old building, it would be requiring too high a degree of care to say that it was the duty of the master to have known that there was a knot in the particular piece of timber, or that the knot ran through the timber at such an angle as to make it dangerous to his workmen.
2. Master and Servant—Injury to Servant Caused from Defective Beam in Building.—While, if the master knew the piece of timber was defective it was his duty to warn him of the defect, but there is no evidence of such knowledge, and it would be unreasonable to require a master to examine every timber in an old house that was being torn down.
3. Master and Servant—Action by Servant for Personal Injury—Evidence—Peremptory Instruction.—In order to hold appellant liable for damages, it would be necessary to show that the foreman knew of the knot in the plank, and that it ran through at such an angle as to make it dangerous, and that he had not warned appellee of these facts. There being no evidence of such knowledge on the part of the master, the peremptory instruction asked should have been given.

EMMETT M. DICKSON and HUMPHREY, MIDDLETON & HUMPHREY for appellant.

DENIS DUNDON for appellee.

**OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

In October, 1911, appellee with other workmen was engaged under the foreman of appellant in tearing down an old building owned by it in the City of Paris, and while so engaged was injured, and instituted this action against appellant, alleging that his injury was caused by its negligence. He recovered a verdict for \$4,175 from which this appeal is prosecuted.

The allegation of the petition is in substance, that the plaintiff while acting under the instructions of defendant's foreman, went upon a cross beam of the building which they were tearing down, and which was several feet above the ground, for the purpose of knocking off the sheeting from the roof of said building, and while so engaged one of the beams or cross pieces broke and the plaintiff fell to the ground, and broke his leg and sprained his ankle.

The negligence relied upon is that the place at which he was so directed by the foreman to work was unsafe at the time and known to the foreman to be unsafe, or could have been known to him by the exercise of reasonable care, and that such danger was not known to the plaintiff, and could not have been known to him by the exercise of reasonable care.

The answer denied the material allegations of the petition, and in a separate paragraph pleaded contributory negligence.

At the conclusion of the plaintiff's evidence, and again at the conclusion of all the evidence the defendant asked for a peremptory instruction, which motions were overruled, and an investigation of the correctness of these rulings involves a statement of the evidence.

The plaintiff stated that he was up on top of the roof, and had been prizing off the sheeting which was under the metal roof that had already been removed, when he was directed by the foreman to go down through the roof and work from the inside in knocking off the sheeting; that is, instead of prizing it up from the outside, to knock it loose from the underside; he states that on one side of the building there was a plank across these beams or joist, and that when he first went down in there from the top, he and the man, Campbell, who was working there with him stood on that plank, and knocked loose the sheeting on that side of the house; but that when he had occasion to go to the other side, there was no plank across the joist on that side, and he

walked across on the joist; that he stepped onto one beam and was in the act of striking up at the sheeting with a short iron piece which he had in his hand for that purpose, when the beam upon which he was resting his weight, broke, and he fell to the floor, some seven or eight feet and was injured.

He says that the reason the beam broke was that there was a knot in it, and that the knot was on the side of the beam opposite from the way he approached it, and that the knot run "bias" and went through or about through it; that he could not see the knot from the side he was on, but that the foreman who was right under him on the other side of the beam could have seen it if he had looked, and that the beam seemed upon the side from which he approached it to be sound. That most of the sheeting had all been knocked loose from the underside, and in so doing, he and Campbell had walked on these beams backward and forward, and that when the beam broke, and he fell, the foreman had only been in the house about two or three minutes.

William White stated that he was working there at the time, and that Watson was engaged in knocking off the sheeting from the underside, and that it was easier to get it off that way than it was to prize it off from the upperside; that the beams upon which Watson and Campbell were standing were put there to hold the building together, and were what is known as "collar beams," and their dimensions were "2x6;" that he afterwards examined the knot that was in the beam, and that it ran from the bottom to the top "catercornered" across the 6 inch way, and that it showed through a little on the other side, and that the knot, the way it ran through the beam destroyed about 95 per cent of the strength of the beam; that the foreman directed them to knock off the sheeting from the inside, and at the time of the accident was standing almost under Watson, and only a few feet from him, and was in position to have seen the knot which was only about 22 inches or 23 inches from his eyes at the time, and that the knot was about the size of his arm and went all the way through the plank "catercornered" and showed a little on the other side.

These are the only two witnesses introduced by the plaintiff showing how the accident happened. The foreman testified that he did not know of the defective condition of the beam and did not see the knot in it, and



had been there where appellant was at work only about two minutes and a half. It will be observed that there was no evidence that the foreman knew of the knot in the plank, or of the weakness of the beam, and the question to be determined is, was the foreman engaged in such work required to exercise ordinary care to discover the unsafe condition of the beam?

The chief danger of the defect seems to have grown out of the angle at which the knot went through the beam, and it may be fairly inferred from the evidence that if it had gone straight through instead of having gone through at an angle or "catercornered," that it would not have destroyed the strength of the beam to such an extent as to have given way under the weight of a man. The law does not impose upon a master engaged in the hazardous work of tearing down an old building, the duty of inspecting it so that his workmen may have a safe place to work; and certainly in this case, it would be requiring too high a degree of care to say that it was his duty to have known that there was a knot in any particular timber in the old house that was being town down, or that the knot ran through the timber at such an angle as to make it dangerous to his workmen. If the master may be mulcted in damages for his failure to discover such defects, or if he must before undertaking such work or during its progress go to the expense and trouble of having a minute examination made of all such timbers, it would make the expense of tearing down an old house almost as great as building a new one.

The cause of this injury was the knot in the beam, and the manner in which it ran through it, and we are unable to see from this evidence how the master could with any ordinary degree of care, have known of the knot, to say nothing of the manner in which it ran through the beam. To require a master to examine every timber in an old house that was being torn down, would be most unreasonable, and we do not see how the foreman in this case could have been expected to know that the particular beam in question was defective. Of course, if he knew that it was defective, it was his duty to warn the workmen of the defect.

The case of Ballard and Ballard Co. v. Lee's Admr., 131 Ky., 412 was in its essential features something like this. In that case Lee was directed to move certain roofing on top of a building, and while so engaged fell

from the roof and was killed. They were in that case also demolishing an old building, and the court said:

"But the master is not, in cases like this, charged with the duty of exercising ordinary care to discover the dangerous or unsafe places and is not liable to respond in damages for an injury to the servant because of the defective or dangerous condition that he did not know of, but which might have been discovered by the exercise of ordinary care. In Thompson on Negligence, section 3979, we find the following: 'The work of tearing down an old building is necessarily attended with dangers, which arise in the progress of the work, and which the master cannot always anticipate and provide against. Therefore, it has been held that the rule which makes it incumbent upon the master to provide his servant with a safe place within which to work does not apply in such situation, though it is conceded to be the duty of the master not to send his servants into a place which he knows to be dangerous without apprising them of the danger. \* \* \* In the destruction of a building there is no attempt or obligation on the part of the master to make it secure; but on the contrary, the work of removal is one in which, in turn, each part of the structure becomes insecure. This every workman understands, and he must be governed accordingly. But, while a person engaged in the demolition of a building is not bound to furnish a workman engaged therein with a safe place to work, he is under an obligation not to send him into a place known to the master to be dangerous, and which the workman cannot perceive to be so by the use of ordinary care.'"

And again in this same case the court said:

"It seems to us that if the owner of a house employs a competent and experienced laborer to take off an old roof and put on a new one, or to repair the roof, or to tear down a building, it is fair to assume that the employe will take the necessary precautions to protect himself from injury on account of the dangerous or defective condition of the premises about which he is engaged to work, and that it would be imposing upon the employer an unreasonable duty to require him to have a careful examination of the premises made for the purpose of discovering defects or dangers in order that he might inform the employe concerning them."

So that it seems under the authority of that case it is not required of a master engaged in the hazardous

business of tearing down an old building, that he should exercise even ordinary care to discover dangerous defects.

The case of *Dyer v. Pauley Jail Building Co.*, 144 Ky., 592, was one where they were tearing down an old jail preparatory to erecting a new one. Dyer was employed on the work and was injured by being struck on the leg by a piece of iron. In response to the argument that it was the duty of the master to furnish him with a safe place to work, the court said:

"For the appellee it is insisted that, even if the injury occurred in this way, it is not liable, for in accepting employment of this character, appellant assumed the risk incident thereto. It was impossible for the appellee to furnish him a safe place to work, for the very work that was being undertaken rendered the place unsafe. Appellant must have known, and did know, that when the bolts were cut and the rivets driven from their places the pieces of sheet iron were liable to and naturally would fall."

In order to hold appellant liable for damages in this case, it would be necessary to show that the foreman knew of the knot in the plank, and that it ran through the beam at such an angle as to make it dangerous, and had not warned appellee of these facts.

We are of the opinion that the peremptory instruction should have been given.

The judgment is reversed for a new trial consistent herewith.

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### Thurman v. Commonwealth.

(Decided June 20, 1913).

#### Appeal from Allen Circuit Court.

1. Jury—Grand and Petit Jurors—How Obtained—Action of Trial Court Directing Sheriff to Summon Bystanders—Exhaustion of Regular Panel.—The action of the trial court in directing the sheriff to summon bystanders after the regular panel had been exhausted is expressly permitted by section 2247 of the Kentucky Statutes. That section seems to give the trial court the discretion either to draw the names from the drum or wheel case, or direct the summoning of bystanders.
2. Homicide—Oath to Sheriff and Deputies to Summon Jurors—Failure of Court to Administer Oath to Deputy.—As to the con-

tention that one of the deputy sheriffs who assisted in summoning bystanders was not sworn as required by section 2262 of the Kentucky Statutes, while it appears that the deputy sheriff referred to was not sworn at the beginning of the term when the sheriff and his other deputies were sworn, and that he did summon several who were examined as to their qualifications for jurors, there is nothing in the record to show whether any one of those summoned by this deputy was accepted as a juror.

3. Homicide—Evidence—Conflict of—Instructions.—While there is an irreconcilable conflict as to whether appellant or deceased first renewed the difficulty that resulted in the killing of deceased, there was such evidence as justified the court in submitting this question which it did in carefully worded and well drawn instructions, and on the whole case no prejudicial error was committed upon the trial.

BRADBURN & BASHAM, O. M. HINTON, W. D. GILLIAM and J. TOM DURHAM for appellant.

JAMES GARNETT, Attorney General; D. O. MYATT, Assistant Attorney General, for appellee.

#### OPINION OF THE COURT BY JUDGE TURNER—Affirming.

Appellant was indicted at the April term, 1912, of the Allen Circuit Court charged with the murder of W. B. Roark, and upon his trial was convicted of manslaughter, and sentenced to the penitentiary.

In his motion and grounds for a new trial, he relies upon three alleged errors:

- (1) That the court erred to his prejudice in refusing after the regular panel of the jury had been exhausted to draw from the drum or wheel case a sufficient number of names to complete the jury; but on the contrary directed the sheriff to summon a sufficient number of bystanders for that purpose.

- (2) That one of the deputy sheriffs who assisted in summoning the bystanders was not sworn as required by section 2262 of the Kentucky Statutes.

- (3) That the verdict is not sustained by the evidence.

Appellant is a citizen of Tennessee, and deceased was a citizen of Allen County in this State, and they resided about fifteen miles from each other.

On the day of the difficulty appellant started from his home, as he says, for the purpose of procuring some whiskey for some members of his family who were ill with the measles. He first sought to procure the whiskey from some other parties near his home, but not suc-

ceeding, he went to the house of deceased. When he reached there deceased was not at the house, but was out on his farm. Upon the return of Roark to the house some time later, appellant made his request for the whiskey, and there seems to have been some hesitation upon the part of Roark to let him have it. This request was a little later renewed by appellant at the barn some little distance away from the whiskey house where it was first made. Appellant became urgent in his request at the barn, and Roark finally peremptorily declined to let him have the whisky, and ordered him to get off his premises. A difficulty between them followed, in which appellant was struck in the head with a rock, and in which Roark was shot in the left arm with a pistol. There was present at the difficulty in the barn one Carter, an employee of Roark.

The residence, barn and whisky house of deceased are located on the Scottsville and Gallatin pike. The whiskey house is south of the residence in the direction of Gallatin. The residence is between the barn and the whiskey house and near the pike, and the barn is about 150 yards north of the residence in the direction of Scottsville, and is about 50 or 60 yards from the pike; there is a foot path going from the barn to the residence running nearly parallel with the pike.

At the conclusion of the difficulty in the barn, appellant went out one way and proceeded hastily down the pike to where his horse was hitched near the whiskey house, while deceased and Carter took the foot path from the barn to the house.

Roark, when he and Carter reached the house, directed Carter to bring him his shotgun, which was done, and when he stepped to the corner of the house, or in view of appellant who was at or near the whiskey house, the difficulty was renewed. There were two shots from a shotgun and several shots from each side with pistols, Roark having also procured a pistol after reaching the house. Roark was fatally injured, from which he died within a few hours.

The evidence is very conflicting as to who began the second difficulty. It is the contention of appellant that after the trouble at the barn, he had in good faith abandoned the difficulty, had fled the field and was unhitching his horse with a view of immediately leaving; when Roark fired upon him from the house with the shotgun.

On the contrary, it is in evidence by several witnesses that the appellant opened the second difficulty, and had fired two shots from his pistol before Roark fired with the shotgun.

(1) The action of the trial court in directing the sheriff to summon bystanders after the regular panel had been exhausted is expressly permitted by section 2247 of the Kentucky Statutes. That section seems to give the trial court the discretion either to draw the names from the drum or wheel case, or direct the summoning of bystanders. In so far as applicable, it is as follows:

"If, in any criminal or penal cause or proceeding called for trial, the panel shall be exhausted by challenge, the judge may supply such jurors by drawing from the drum or wheel case, or may direct the sheriff to summon for trial of that cause, any number of bystanders or persons to fill such vacancies." (*Laughlin v. Commonwealth*, 18 R., 640).

It was doubtless the purpose of the statute in giving this discretion, to enable circuit courts to proceed with the business without the delay which might be occasioned by summoning the jurors whose names should come out of the drum; and to facilitate business by summoning the bystanders who were already at or near the courthouse in order that such delay might be avoided.

(2) It appears that the court failed at the beginning of the term to administer the oath required by section 2262 of the Kentucky Statutes to one of the deputy sheriffs; and it is urged that in as much as this deputy participated in the summoning of the bystanders without having taken the statutory oath, the jury was not made up according to law.

It does appear that the deputy sheriff referred to was not sworn at the beginning of the term when the sheriff and his other deputies were sworn, and that he did summon several who were examined as to their qualifications for jurors; but there is nothing in the record to show whether any one of those summoned by this deputy was accepted as a juror.

Section 281 of the Criminal Code as amended by the Act of 1910 is as follows:

"The decisions of the court upon challenges to the panel, and for cause, or upon motion to set aside an indictment, shall not be subject to exception."

It appears that this question was first raised by appellant in the motion and grounds for a new trial; but if it had been made at the trial, and it had affirmatively appeared that some one or more members of the jury who were accepted and tried the case, had been summoned by the deputy who was not sworn, it would not have been within the power of this court under the provisions of the section quoted to review the action of the circuit court.

The challenge by appellant of such a juror would have necessarily been a challenge "for cause," and under the express terms of that section the action of the circuit court would not have been subject to exception. *Curtis v. Commonwealth*, 110 Ky., 845; *Vinegar v. Commonwealth*, 104 Ky., 106; *Powers v. Commonwealth*, 114 Ky., 237; *Hendrickson v. Commonwealth*, 146 Ky., 742; *Lawson v. Commonwealth*, 152 Ky., 113.

(3) We are free to confess that we have been somewhat impressed with the contention of appellant that the circumstances show that he in good faith had abandoned the difficulty after the first trouble in the barn, and that deceased was the aggressor in the second difficulty in which he was killed; but a careful examination of the evidence discloses an irreconcilable conflict as to whether appellant or deceased first renewed the difficulty. We are unwilling to say that there was not such evidence as justified the lower court in submitting this question. The rule that where there is any conflict in the evidence the issues must be submitted to the jury is too well known to call for elaboration.

These questions were all submitted to the jury in carefully-worded and well-drawn instructions which are not complained of.

On the whole case we see no prejudicial error.

Judgment affirmed.

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### Henry M. Bosworth, Auditor v. Harp.

(Decided June 20, 1913).

#### Appeal from Franklin Circuit Court.

- 1 **Pensions—Grant of to Confederate Soldiers—Public Services Rendered By.**—A state may grant a pension to Confederate soldiers for public services rendered by them to the state during the Civil war when the state officially declared that it would

remain neutral during the war, and the services of the soldiers were rendered in an effort to maintain the sovereignty and the rights of the state as declared in the state constitution.

- 2 Pensions—Word "Appropriate" Not Necessary to Act.—It is not necessary that an act should use the word "appropriate" and when it fixes the amount to be paid out of the treasury to the claimant, and directs how it shall be paid, this is sufficient.
3. Pensions—Allowing On Account of Public Services.—An act allowing a pension on account of public services is not invalid because such persons are put upon a different footing from other citizens.

JAMES GARNETT, Attorney General; CHARLES H. MORRIS, Assistant Attorney General, for appellant.

HAZELRIGG & HAZELRIGG, J. W. BLACKBURN, JR., and W. J. STONE for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

By an act approved March 11, 1912, it was provided that any indigent disabled person who has been a citizen and an actual *bona fide* resident of this State continuously since January 1, 1907, and who actually served one year or until the close of the Civil War, in the military or naval service of the Confederate States or the widow of such person to whom he was married prior to January 1, 1890 shall be paid out of the State Treasury a pension of \$10 a month. No person is entitled to the benefits of the act who is able to earn a support by manual labor or by reason of his knowledge or skill in any profession, trade or craft or who receives a pension from the United States government or any State or foreign government; or removes from the State or is absent therefrom for one year, or has a net income of \$300 a year or has property of the value of \$2,500, or is living with his wife who possesses property or income sufficient for the suitable support of herself and family including her husband, or whose support is comfortably provided for by reason of a contract or agreement with a person able to provide it, or who by reason of the partial ability to earn a support and income or property, is able to obtain an income equivalent to \$300 a year. Provision is made in the act for the allowance of the pension claims. James M. Harp, a resident of Franklin county made application for a pension under the act, and his claim having been



duly allowed he presented his pension voucher properly executed as provided in the act, to the Auditor, who refused to pay it or to issue a warrant therefor. He thereupon brought this suit in the Franklin Circuit Court to obtain a mandamus compelling the Auditor to issue a warrant for the amount. The circuit court awarded the mandamus as prayed. The Auditor appeals.

Section 3 of the Constitution among other things provides:

“And no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men except in consideration of public service.”

It is insisted that the act is invalid under this section of the Constitution on the ground that the act grants to indigent Confederate soldiers exclusive, separate privileges not granted to other indigent persons. The question to be determined is did the Confederate soldiers render public services to the State of Kentucky within the meaning of the Constitution. In *Ferguson v. Landrum*, 1 Bush, 593, this court held that separate emoluments or privileges within the meaning of the constitutional provision may be allowed “when the persons shall by heroic deeds, inventive genius, or great mental endowments and a life of public virtue, become in the judgment of the Legislature, a public benefactor.” The Massachusetts Supreme Court in answer to an inquiry of the Legislature as to the legality of pensions allowed by that State to Federal soldiers in the Civil war, said this:

“The question asked by the honorable Senate should be answered in the affirmative so far as to say that the general principle referred to—gratuities to Civil war veterans—may have legitimate application to services such as generally have been treated as deserving recognition by the payment of sums of money, the erection of statues or the bestowal of medals, decorations or other badges of honor. In the application of the principle, the question ordinarily will be whether the benefit is conferred as an appropriate recognition of distinguished or exceptional service, such that the dignity of the State will be enhanced and the loyalty and patriotism of the people will be promoted by making it a subject of governmental action.” (Opinion of Justices, 190 Mass., 611).

In *Judson on Taxation*, Sec. 349, it is said:

“Whatever legitimately tends to inspire patriotic sentiments and to enhance the respect of citizens for the institutions of their country and incites them to contribute to its defense in time of war has been held to be a lawful purpose, and such as will justify the exercise of either the power of taxation, or of the power of eminent domain.”

Necessarily the matter is one committed to the discretion of the General Assembly, and when the Legislature has declared the use a public one, its judgment will be respected by the courts, unless the use is palpably without reasonable foundation. (*U. S. v. Gettysburg*, 160 U. S., 688). It is true the services of the Confederate soldiers were directed against the federal government but appellee and his comrades were citizens of a sovereign state. Their claim rests solely upon the ground that they rendered public services to the State of Kentucky. The colonies before the formation of the Union exercised the power of granting pensions or bounties to soldiers. This power has since been exercised by the United States and by many of the States, and that the Legislature has the power in a proper case to grant pensions for public services must now be admitted. To determine whether the Confederate soldiers rendered public services to the State of Kentucky we must put ourselves in the situation of things at the opening of the Civil war, and determine their rights by the circumstances which then surrounded them.

When the Constitution of the United States was formed, each of the thirteen colonies was an independent sovereignty and each jealousy maintained that it had not parted with its sovereignty in forming that Constitution. By the 10th Amendment to the Constitution enacted by Congress at the first session after its adoption, it was provided:

“The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.”

From the formation of the government it was maintained by each of the States that being sovereign, it had a right to withdraw from the compact it had made at pleasure; that this right not being prohibited by the Constitution to the States, was reserved by them. The New England States in unequivocal terms asserted this right from 1803 to 1814 with reference to the Embargo Act, the acquisition of Louisiana and the war of 1812.

In 1812 when called on for troops, Massachusetts, Connecticut and Rhode Island each refused, reasserting the sovereignty of the State and insisting that she was not bound to obey until she felt it to be to the interest of her citizens to do so. (New England Federalism, page 523, by Henry Adams.) In 1814 Connecticut, Rhode Island, New Hampshire and Vermont in the Hartford Convention made this declaration:

"In case of deliberate, dangerous and palpable infractions of the Constitution, affecting the sovereignty of a State and the liberties of the people, it is not only the right, but the duty of each State to interpose its authority for the protection in the manner best calculated to secure that end."

Nowhere was this sentiment stronger than in Kentucky. By section 1 of the Resolutions of 1798 it was declared as follows:

"Resolved that the several states composing the United States of America, are not united on the principle of unlimited submission to their general government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to their own self government; and that whensoever the general government assumes undelegated powers, its acts are unauthorized, void, and of no force: That to this compact each State acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: That the government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress."

The principle announced in this resolution was steadily maintained in Kentucky from that time until the breaking out of the Civil war. It was recognized from time to time in the platforms of the leading political parties and by the General Assembly. Its principle was imbedded in the Constitution adopted in 1851. Sec. 4, Bill of Rights. In his life of Daniel Webster, page 172, Henry Cabot Lodge, for many years a prominent United States Senator, says:

"When the Constitution was adopted by the votes of States at Philadelphia and accepted by the votes of States in popular convention, it is safe to say that there was not a man in the country from Washington and Hamilton on the one side to George Clinton and George Mason on the other, who regarded the new system as anything but an experiment, entered upon by the States and from which each and every State had the right peacefully to withdraw, a right which was very likely to be exercised."

In October, 1912, General Charles H. Grosvenor, of Ohio, a gallant soldier in the Federal army, and for many years a leader in Congress, in a speech made to his comrades of the Army of the Cumberland in Chattanooga said:

"Now, if there is a Confederate soldier in the house, I want him to stand up. Figuratively speaking, I am going to defend him. You Confederate soldiers did not believe that you were compelled to stay in the Union. Lee, Jackson, Calhoun, and other great men, of the South, believed the same on that question. They did what they believed to be right. They saw the Constitution as it was adopted. Who is here to call them criminals? Certainly, not I."

With these facts in mind let us look briefly at the historical facts as to the attitude of Kentucky at the opening of the Civil war. Kentucky was a slave holding State. In her Constitution adopted in 1851, it was declared:

"The right of property is better and higher than any constitutional sanction, and the right of the owner of a slave to such slave and its increase, is the same and as inviolate as the right of the owner of any other property whatever."

When the Southern States seceded, and Kentucky was called upon by the Federal government to furnish troops for the war, she declined, believing that the Federal government had not the constitutional right to coerce them back into the Union. The House of Representatives adopted the following resolution:

"Resolved by the House of Representatives, that this State and the citizens thereof should take no part in the Civil war now being waged, except as mediators, and friends of the belligerent parties; and that Kentucky should during the contest occupy the position of strict neutrality.

Resolved that the act of the Governor in refusing to furnish troops or military force upon the call of the executive authority of the United States, under existing circumstances, is approved."

The General Assembly provided the sum of \$1,000,000 for the expenses of arming and disciplining the militia; \$750,000 to be expended for arms; one-half to be issued to the State guard and the other half to the home guards. The State guard was to be at once placed in camp; the home guards were to be held in reserve; and it was provided that "neither the arms nor the militia were to be used against the government of the United States nor the Confederate States, unless in the sole defense of the State of Kentucky." In a few months the State was invaded both by the Confederate and the Federal troops, and soon it became evident that Kentucky's position of neutrality could not be maintained. The result was that those who espoused the cause of the Union went to the Federal army, and those who maintained the right of the State as a sovereign to control her own matters, went to the Confederate army. The Civil war was not a mere insurrection against an existing government; it was a contest between two sovereignties. Up to that time in the Southern States especially, it was maintained that the citizen owed his first allegiance to his State, and the war was the result of what these men believed to be an unconstitutional effort to destroy the sovereignty of the several States, and take from them their right to control their own local matters.

The Civil war is often spoken of as the war of secession, as though secession was the cause of the war. But the cause of the war was deeper than that. It was the irrepressible conflict between two independent sovereignties, and the cause of the conflict with slavery. The Southern States maintained that they had a right to regulate their own internal affairs, and that these were beyond the control of the national government. In 1859 John Brown made his raid upon Harpers Ferry in an effort to incite an insurrection of the negroes for the murder of the peaceful inhabitants of Virginia. This deeply stirred the South for the defenseless women and children would be the first to suffer. While John Brown's effort failed, he was lauded as a hero and a patriot by many of the extremists of the North, and so prevalent was this sentiment that the Southern people became alarmed. The decision of the United States Supreme

Court in the Dred Scott case which had been rendered a few years before was openly assailed, and such declarations as the following were common:

"There is a higher law than the Constitution which regulates our authority over the domain. Slavery must be abolished and we must do it."—W. H. Seward.

"The Union is a lie. The American Union is an imposture, a covenant with death and an agreement with hell."—William Lloyd Garrison.

"The fugitive-slave act is filled with horror—we are bound to disobey this Act."—Charles Sumner.

"The Union is not worth supporting in connection with the South."—Horace Greley.

"The times demand and we must have an anti-slavery Constitution, an anti-slavery Bible and an anti-slavery God."—Anson P. Burlingame.

Without the question of slavery no Southern State would have seceded, and without that question no army could have been mustered in the North to carry on the war against the South. The trouble had been brewing for a number of years and the inevitable had at last come. The question had to be settled by arms. It is true that might makes right, but it does not follow that might is right. The Southern soldier fought for a principle, the right of each State to regulate its local affairs—a principle that everybody conceded when the Constitution of the United States was formed and without which that instrument could never have been adopted. The Kentucky soldiers who fought in the Confederate army fought to maintain this principle for the State of Kentucky, and while they lost in the wager of battle, Kentucky has always recognized that they fought for a principle and were rendering public services to their State. In every section of the State after the close of the war, it was the pleasure of the people of Kentucky to advance to office the Confederate soldiers; for many years they filled the more important offices of the State, and literally controlled the State's affairs. The Legislature made appropriations for monuments to distinguished Confederate soldiers. In 1902 it established a home for Confederates, and this has been since maintained at the expense of the State, an appropriation of \$175 a year being made for each inmate. In 1904 it appropriated the sum of \$2000 to mark the Confederate graves at Perryville, Kentucky. Monuments have been erected to Generals John C. Breckenridge, John H. Morgan and other distinguished

Confederates. None of these appropriations have ever been questioned or assailed; and they show a settled policy by the Legislature acquiesced in by the people of the State to regard the Confederate soldiers as having rendered public services to the State of Kentucky.

In the year 1850 the Legislature of Kentucky provided for the placing of a block of Kentucky marble in the Washington monument bearing this inscription:

“Under the auspices of Heaven and the precepts of Washington, Kentucky will be the last to give up the Union.”

Kentucky did not secede. Virginia was the last State to secede, and it is almost certain that Virginia too would not have seceded but for John Brown's cold blooded effort to bring about a massacre of the women and children of the State, and the spirit with which much of the north regarded his undertaking. But all of the secession ordinances were invalid; for in legal effect as was afterwards held, all the secession ordinances were void. So Kentucky's position was not substantially different from that of the other Southern States. Over fifty years have passed since the breaking out of the Civil war. The passions engendered by the struggle have subsided and all have learned to realize that the country could not continue part free and part slave holding. Kentucky no less than the other States rejoices in the prosperity and greatness of our reunited country. All now recognize the fact that He who does all things well ruled in that conflict bringing about His eternal purposes, and all now see that the usefulness of this country and its power for good would have been greatly curtailed if the struggle had ended otherwise than it did. As passions have subsided those on each side have perceived the patriotic motives prompting the other, and have learned to honor their sincerity and devotion to duty. Every Englishman regards the common heritage of the race, the heroism and self-sacrifice of the combatants on either side in the war of the Roses, and the same sentiment is fast coming into the hearts of all Americans as to all those who endured hardship and hazarded their lives for the cause they deemed just in our Civil war. So it is that in the General Assembly the bill before us was passed by a practically unanimous vote, all political parties agreeing upon it.

The war wrought a revolution. The Union as the fathers understood it was merged in the nation. State sovereignty as they understood it passed out of sight.

The doctrine of the resolutions of 1798 that the Federal government was not the final judge of the extent of its powers, and that each State had an equal right to judge for itself as well of infractions as of the mode and measure of redress, which was universally maintained at that time and for the next fifty years, was by the war determined to be no longer true. But the soldiers who fought for this principle to maintain the rights of their sovereign State, no less rendered public services to their State than the men who served in the Federal army to rid the country of the blight of slavery. The Kentucky soldiers in the Federal army served faithfully the sovereign to whom they deemed they owed their first allegiance and they have been provided for by the sovereign they served. The Kentucky soldiers in the Confederate army served no less faithfully their State, the sovereign to whom they deemed they owed their first allegiance, and that sovereign may with equal propriety honor their self-sacrifice, gallantry and patriotism by protecting them in their age from want.

Section 230 of the Constitution provides:

“No money shall be drawn from the State Treasury except in pursuance of appropriations made by law.”

It is insisted that the act is void because no appropriation is made as provided by this section. But it is not necessary that an act of the Legislature should use the word “appropriate.” The act directs that the vouchers issued to the pensioners shall be paid out of the Treasury upon the warrant of the Auditor and the Auditor is directed to issue his warrant to each person for the amount of his claim. This is an appropriation within the meaning of the Constitution. The General Assembly has for years made similar appropriations. The appropriation to the Confederate Home is made in the same way, \$175 being allowed for each inmate. Allowances in the same way are made for the support of the insane asylums and other institutions of the State.

Section 171 of the Constitution provides:

“Taxes shall be levied and collected for public purposes only.”

But a tax is levied for public purposes where the money is used to pay a pension granted in consideration of public services. For the same reason the act is not a special law. Indigent Confederate soldiers are placed upon a different footing from other indigent persons in the State because of the public services rendered by them.



Dean Shaler of Harvard University, himself a gallant Federal soldier, says this of one Kentucky brigade:

"On May 7, 1864, this brigade, then in the army of General Joseph Johnston, marched out of Dalton, 1,140 strong, at the beginning of the great retreat upon Atlanta before the army of Sherman. In the subsequent hundred and twenty days, or until September 3, the brigade was almost continuously in action or on the march. In this period the men of the command received 1,860 death or hospital wounds, the dead counted as wounds, and but one wound being counted for each visitation of the hospital. At the end of this time there were less than fifty men who had not been wounded during the hundred and twenty days. There were 240 men left for duty, and less than ten men deserted. A search into the history of war-like exploits has failed to show me any endurance to the worst trials of war surpassing this. We must remember that the men of this command were at each stage of their retreat going farther from their firesides. It is easy for men to bear great trials under circumstances of victory. Soldiers of ordinary goodness will stand several defeats, but to endure the despair which such adverse conditions bring for more than a hundred days demands a moral and physical patience, which, so far as I have learned, has never been excelled in any army."

This is given only as an illustration. Similar things may be said of the other Kentucky troops. So long as the courage of the battlefield or the risking of one's life for his country is honored and it is the policy of the State to promote the loyalty and patriotism of the people by fostering the martial spirit, such services constitute a reasonable basis for classification. The honor due to the true and the brave is not limited to those who are successful in the struggle. Greece still honors the Spartans who defended the pass at Thermopylae. The names of Wallace and his comrades are yet household words in Scotland. They who died at the Alamo are honored of all Americans. The state may show that the republic is not ungrateful to these men not only by erecting monuments to them when dead or placing flowers on their graves, but it may with equal propriety gladden their hearts while living and in their infirmity give them bread.

Judgment affirmed. Judge Lassing dissents.

## OPINION BY JUDGE LASSING—Dissenting.

When the act under consideration was adopted, there was in force in this State a general law making provision for the support of all indigent and dependent Confederates and their widows. Kentucky Statutes, Chapter 22-a and amendments thereto. The act before us is not general in its application, and is in direct and open violation of section 59, sub-section 29, of the Constitution, which provides: “ \* \* \* where a general law can be made applicable, no special law shall be enacted.”

The Legislature has the undoubted right to classify persons to be affected by a Legislative act, but such right is always subject to the limitation that the classification must be reasonable and natural. The classification here attempted is neither reasonable nor natural, but is arbitrary and unjust. Thousands of our citizens, equally deserving and with less means of support than many of those provided for in this act, are denied its benefits. It is class legislation of the worst type.

But, brushing aside the plain provisions of the constitution, the validity of the act is upheld upon the ground that they, who are provided for therein, have rendered such public service as that they should be provided for. I concede that the Confederate soldiers were brave men and that they fought with a courage and determination that challenged the admiration of the civilized world, but, by the arbitrament of the sword, every principle for which they contended was decided against them. The integrity of the Union was preserved. While theirs was a brave, gallant, and heroic fight, I cannot bring myself to believe that, in their struggle for the lost cause, they rendered either the National or the State Government a “public service” within the meaning of these words as found in the bill of rights.

When Legislatures, swayed by sentiment, make reckless appropriations in violation of the plain provisions of the Constitution, the people look to the courts for relief against the oppressive and unjust taxation which such legislation produces; and courts, much as they may sympathize with the condition of those who are made the beneficiaries of such legislation, should hesitate to give to the plain language of the Constitution a strained construction in order to uphold such legislation. The rights of those, not benefitted by the act, are entitled to the court's protection as much as the rights of those who are.

I have been unable to find any case where one, whose efforts were directed toward disrupting the government, has been declared to have rendered a "public service" to that government. The construction which the majority opinion gives the words "public service" as found in the bill of rights, is certainly at variance with the generally accepted meaning of these words, and I am unwilling to adopt such construction and thereby add at least a half million dollars annually to the already heavy burden of our tax-ridden people. For this reason I dissent.

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**Wickliffe, et al. v. Turner, et al.**

(Decided June 20, 1913).

**Appeal from Ballard Circuit Court.**

1. Banks—Where Directors of Knowingly Allow Indebtedness in Violation of Sections 583 and 598 Ky. Stats.—Under sections 583 and 598 Ky. Stats., the directors of a bank who knowingly allow indebtedness to be created in violation of section 583 are liable to a stockholder for any damages he sustains thereby, and he may sue in his own name to recover such damages.
2. Banks—Section 583 Ky. Stats.—Construction of.—When different clauses of section 583 Ky. Stats., have been violated, that clause will be enforced which is most favorable to the bank, its depositors and stockholders.
3. Banks—Construction of Section of 583 Ky. Stats.—Section 583 is violated if the bank purchases the paper of a person beyond the limits therein prescribed no less than where it lends the money directly to such person.

O'REAR & WILLIAMS, HAL. S. CORBETT and J. B. WICKLIFFE for appellants.

H. L. SMITH, H. F. TURNER for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

The Farmers Bank of Wickliffe was organized with a capital stock of \$15,000. Mrs. L. M. Turner held eight shares of stock each of the par value of \$100. The bank failed and Mrs. Turner brought this suit against appellants who were the directors of the bank to recover for the loss of her stock by reason of violations of law by the

directors in the conduct of the bank, in this, that they permitted O. B. Beck to become indebted to the bank in the sum of \$12,060.57; Charles McChord, a director, to become indebted to the bank in the sum of \$5,595.25; and the city of Wickliffe to become indebted to it in the sum of \$6,892.05. The actual surplus on hand never at any time exceeded \$640. \$2,000 was realized on the McChord debt, but the other two debts were practically a total loss. Sections 583 and 598, Kentucky Statutes, are as follows:

“No bank shall permit any of its stockholders, or any person, company or firm, including in the liability of the company or firm the liability of the individual members thereof, directly or indirectly, to become indebted to it in a sum exceeding twenty per cent of its capital stock actually paid in, and its actual amount of surplus, unless such borrower pledge with it good collateral security, or execute to it a mortgage upon real or personal estate which at the time is of more than the cash value of such loan or indebtedness above all other incumbrances; and if the borrower is a director or officer of such bank, he shall not be permitted to become indebted to it in excess of ten per cent of its paid-up capital stock, without securing the excess by the mortgage or pledge of real or personal property double in value the amount of such excess; and in no event shall the indebtedness of any person, company or firm, including in the liability of the company or firm the liability of the individual members thereof, exceed thirty per cent of its paid-up capital and actual surplus.” (Sec. 583, Kentucky Statutes).

“If any director or directors of any bank shall knowingly violate or permit any officer or employee of the bank to violate any of the provisions of the law relating to banks, the directors so offending shall be jointly and severally individually liable to the creditors and stockholders for any loss or damage resulting from such violation; and if any such loss or damage be not made good within a reasonable time, it shall be the duty of the Secretary of State, with the consent of the Attorney General, to institute such proceedings as may be necessary to forfeit the charter of such bank.”

It will be observed that by section 583, Kentucky Statutes, a bank may not permit any person to become indebted to it in a sum exceeding 20 per cent of its capital stock actually paid in and its actual amount of surplus unless such person pledge with it good collateral security or execute to it a mortgage upon real or personal prop-

erty which at the time is of more than the cash value of such loan or indebtedness above all other incumbrances; and if the borrower is a director or officer of the bank he shall not be permitted to become indebted to it in excess of 10 per cent of its paid up capital stock without securing the excess by the mortgage or pledge of real or personal property, double in value the amount of such excess, and in no event shall the indebtedness of any person exceed thirty per cent of its paid up capital stock and actual surplus. It will also be observed that by section 598 the directors who knowingly violate or permit any officer of the bank to violate any of the provisions of the act are individually liable to the creditors and stockholders for any loss or damage resulting from such violation.

Under the statute if the directors knowingly permit any person to become indebted to the bank beyond the 30 per cent limit they are responsible to the bank for the excess over and above 30 per cent whether they take security or not or use diligence in looking after the affairs of the bank; but they are under this clause made guarantors only of the excess of the indebtedness over and above the 30 per cent limit. On the other hand if the directors knowingly permit any person to become indebted to the bank in excess of the 20 per cent limit without a pledge to it of good collateral security or the execution of a mortgage upon real or personal estate, which is at the time of more than the cash value of such loan or indebtedness above all other incumbrances, they violate the statute. It is their duty under the statute when the 20 per cent limit is exceeded to take collateral security or a mortgage of the cash value of the whole indebtedness, and if they allow the 20 per cent limit to be exceeded without taking a mortgage or collateral security, they become liable for the whole debt; or if they negligently take collateral security or a mortgage which is insufficient under the statute, they are also liable for the whole debt under this clause. If the borrower is a director or officer of the bank and with their knowledge, creates an indebtedness in excess of the 10 per cent limit, without securing the excess over 10 per cent by mortgage or pledge double in value the amount of such excess, they are in like manner liable for the excess over 10 per cent, if no pledge or mortgage is taken or if a mortgage or pledge which is insufficient under the statute is negligently taken. The statute was designed for the protection of the bank, its

depositors and stockholders, and must be liberally construed with a view to promote its purposes. That clause of the statute will in every case be applied which best protects the bank, its depositors and stockholders.

Applying these principles to the case before us, what have we, Although Beck was permitted to become indebted to the bank in the sum of \$12,420, no mortgage or collateral security for the indebtedness was taken from him. He executed notes to the bank with Charles Wickliffe as surety and to secure one note for \$3,000 he executed a mortgage to Wickliffe on some property. This manifestly did not satisfy the statute. The wisdom of the statute in forbidding personal surety is illustrated by what happened in this case; for Wickliffe escaped liability on all the notes on the ground that the bank had given time to the principal without his knowledge or consent. (See *Farmers Bank of Wickliffe v. Wickliffe*, 134 Ky., 627). The statute is designed to prevent the occurrence of such losses when the 20 per cent limit is exceeded. The mortgage executed by Beck to Wickliffe only securing \$3,000 of the debt in no sense complied with the statute. McChord executed to the bank a mortgage on some land in Mississippi; but there was a prior lien on the land. There is some evidence in the record that the property would have been sufficient to secure the debt but for the panic of 1907; but there is no evidence that at any time the property mortgaged was of value double the amount of the excess over 10 per cent. So this mortgage did not comply with the statute and the record shows no reasonable investigation by the directors as to the sufficiency of this mortgage before it was taken. No security of any kind was taken for the indebtedness of the city of Wickliffe. On these facts the jury found for the plaintiff the whole amount of her stock, \$800. The defendants appeal.

It is insisted that the cause of action against the directors is in the bank and that Mrs. Turner who is only one of the stockholders, cannot maintain an action to recover for her loss. But the right of action to the stockholders is expressly given by section 597, Kentucky Statutes, and under the statute she may maintain an action in her own name to recover for her loss. An objection for defect of parties cannot be made for the first time in this court. It is also insisted that the indebtedness of the city of Wickliffe does not come within the meaning of section 583 on the ground that the city borrowed no

money from the bank, the facts being these: The city issued warrants and the bank paid them. The purpose of the statute is to prevent more than a certain per cent of the capital of the bank being invested in an indebtedness of one person. Within the purview of the statute it is immaterial whether the bank lends the money to the person and takes his note for it or buys his paper from another. The proper effect of the statute would be entirely defeated if it were held that though the bank could not lend money to another above the limits prescribed, it could buy his paper to any limit from other persons. The statute was designed to protect the bank against the risk of a heavy loss by reason of an indebtedness being created to it from one person above the limits prescribed.

Lastly, it is insisted that the circuit court misinstructed the jury, but taking the instructions as a whole, and in view of the facts established without controversy in the record as we have stated them above, the instructions were not prejudicial to the defendants. (*City of Franklin v. Caldwell*, 123 Ky., 526; *Randolph v. Ballard County Bank*, 142 Ky., 145).

Judgment affirmed.

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**Louisville & Nashville Railroad Co., Henderson  
Bridge & Railroad Co., Central Trust Co. of  
New York v. City of Henderson.**

(Decided June 20, 1913).

**Appeal from Henderson Circuit Court.**

**Contracts—Right of City to Tax Bridge Company—Sale of Bridge Company Property—Franchise Tax.**—Under a contract between a bridge company and a city by which it was agreed that the city reserved the right to tax the bridge and its appurtenances, the city has a vested right to collect a tax on the bridge and its appurtenances, but no vested right to collect a franchise tax from the bridge company; and the sale by the bridge company of its property to another is valid, although by means of the sale, the city is disabled from collecting a franchise tax from the bridge company as it had formerly done.

CHAS. H. MOORMAN, BENJAMIN D. WARFIELD, YEAMAN &  
YEAMAN and H. L. STONE for appellants.

JOHN C. WORSHAM for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Reversing.

By an act approved February 9, 1872, the General Assembly incorporated the Henderson Bridge Company giving it authority to construct a bridge across the Ohio River extending from some convenient point within the corporate limits of the city of Henderson to some convenient point on the Indiana side of the river opposite the city of Henderson, with power to purchase or take by condemnation such real estate as was necessary for the site of the bridge, piers, abutments, toll houses and such other purpose as might be necessary, and to extend a railroad over the bridge with as many sets of tracks as were deemed expedient. The company was organized under the charter. The city of Henderson enacted an ordinance granting the company certain rights and privileges. Sections 1 and 4 of this ordinance are as follows:

"1. That the Henderson Bridge Company organized under the act of the General Assembly of the Commonwealth of Kentucky, approved February 9, 1872, be and they are hereby granted the right to construct on or over the center of Fourth street in the city of Henderson and on the line thereof extended to low water mark on the Indiana side of the Ohio River such approaches, avenues, piers, trestles, abutments, toll houses and other appurtenances necessary in the erection of and for the business of a bridge over the Ohio River from a point in the city of Henderson to some convenient point on the Indiana side of said river and for such purposes the use of said Fourth street is hereby granted subject to the terms and conditions hereinafter expressed.

"4. That nothing herein shall be construed as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge or any building erected by said bridge company within the corporate limits of said city the bridge itself and all appurtenances thereto within the limits of said city."

The bridge was built and was maintained by the Henderson Bridge Company from the year 1885 to the 26th of June, 1906, and the Bridge Company paid to the city of Henderson taxes on its physical properties and for many years also paid to the city a franchise tax, under section 4077, Kentucky Statutes. On the 26th day of June, 1906, the Henderson Bridge Company filed in the office of the county court of Jefferson County and in the office of the



Secretary of State of Kentucky an amendment to its charter by the terms of which its name was changed to the Henderson Bridge and Railroad Company and it was authorized in addition to the rights conferred upon it by its original charter to build, construct and operate a line of railroad from the termination of its bridge approach in the city of Henderson through the city and other places in Kentucky to a point opposite Shawneetown, Illinois, and it was further authorized to transfer and convey its property to any other railroad company. By deed of date June 30, 1906, the Henderson Bridge and Railroad Company conveyed to the Louisville & Nashville Railroad Company all of its property of every kind tangible and intangible, including the bridge and all the rights, privileges and franchises of the Henderson Bridge and Railroad Company. After this deed was made the Louisville & Nashville Railroad Company paid to the city of Henderson taxes on the physical properties in the city and also paid to it such part of its franchise tax as fell to the city under Sections 4077-4081, Kentucky Statutes. On November 3, 1908, the city brought this suit against the Louisville & Nashville Railroad Company in which it set up the facts above stated, charging that the amended articles of incorporation were void in so far as they affected the right of the city to collect a franchise tax from the Henderson Bridge Company; that the whole arrangement was simply a device to defeat the city in the collection of this tax, and that under the ordinance of the city under which the bridge was constructed, the city had a contract right to collect the franchise tax from the Henderson Bridge Company. It prayed that the amended articles of incorporation and the deed to the Louisville & Nashville Railroad Company be set aside in so far as they affected the right of the city to collect the franchise tax. The court on final hearing entered this judgment:

"This cause coming on to be heard on the pleadings and the proof, and the court being advised, adjudges,

"That by virtue of the ordinance of the city of Henderson \_\_\_\_\_, 1882, the provisions of which were approved and accepted by the defendant the Henderson Bridge Company, and under the terms of which certain franchises and privileges were granted to the said defendant by said city, and the right reserved to plaintiff to levy and collect taxes on the property of said Bridge Company within the corporate limits of the city of Henderson, the plaintiff has the contract right to have the

franchise of said Henderson Bridge Company valued and assessed by the State Board of Valuation and Assessment, or the proper authority, and to levy and collect taxes on said franchise assessment for such purposes as plaintiff is, by law, authorized to levy and collect taxes."

The court further adjudged that the amended articles of incorporation and the deed to the Louisville & Nashville Railroad Company be set aside so far as they affected the rights of the city to collect the taxes and adjudged that the State Board of Valuation and Assessment or other proper authority, shall value and assess the franchise of the Henderson Bridge Company as a corporation separate and distinct from the Louisville & Nashville Railroad Company. The Railroad Company appeals.

The propriety of the judgment depends upon the proper construction and legal effect of the ordinance of the city under which the bridge was built. It will be observed that by the first section of the ordinance the Bridge Company is given the right to construct "such approaches, avenues, piers, trestles, abutments, toll houses, and other appurtenances necessary in the erection of, and for the business of a bridge over the Ohio River." By the 4th section of the ordinance it is provided that nothing therein shall be construed as waiving the right of the city of Henderson to levy and collect taxes "on the approaches to the said bridge or any building erected by said Bridge Company within the corporate limits of said city, the bridge itself and all appurtenances thereto, within the limits of said city." It is manifest that the word "appurtenances" is used in sections 1 and 4 in the same sense and refers to the appurtenances to the bridge within the limits of the city; that is, the city reserved the right to tax the bridge itself and all the other physical property appurtenant to the bridge and lying within the city. The tax on this physical property has been paid. The thing in question here is the franchise tax of the Henderson Bridge Company. Did the city by its ordinance reserve the right to collect a franchise tax upon the Henderson Bridge Company, assessed under section 4077, Kentucky Statutes? The answer to the question depends upon what that tax is. In *Henderson Bridge Co. v. Commonwealth*, 99 Ky., 623, where the court had this question before it, after reviewing the provisions of the Constitution and the statute, it thus summed up its conclusion:

"In the light of the foregoing provisions of the Constitution, and of the act of the Legislature, and of the instructions given to the Board of Valuation and Assessment and of the sworn statement demanded of the president of the company, on which, with other testimony to make this valuation, we are constrained to say that by this term capital stock the Legislature meant to include the entire property, real and personal, tangible and intangible, all assets on hand, and its franchise as well, and that when so embraced and construed and valued as an entirety, then to take off the tangible property already assessed, and that the net balance will show and shall be the value of the franchise to be taxed under section 4077."

An appeal was taken from that judgment to the Supreme Court of the United States, and in affirming the judgment that court said:

"The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals as consistent with the provisions of the Constitution of Kentucky in reference to taxation." (Henderson Bridge Co. v. Ky., 166 U. S., 150).

The construction of the statute thus announced has been uniformly maintained by this court since. (Louisville, Etc., Ferry Co. v. Commonwealth, 104 Ky., 735; Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky., 167; So. R. R. Co. v. Coulter, 113 Ky., 668; Cumberland Tel. Co. v. Hopkins, 121 Ky., 850; Commonwealth v. Walsh's Trustee, 133 Ky., 122; Commonwealth v. Cumberland Tel. Co., 124 Ky., 539; So. Pac. Co. v. Commonwealth, 134 Ky., 410).

The ordinance under which the bridge was constructed retained in the city the right to tax the physical property of the Bridge Company within the city and its right to tax this property cannot be affected by an amendment of the articles of incorporation of the Bridge Company. But the ordinance of the city retained in the city no right to collect a tax on the intangible property of the bridge company; and the franchise tax under section 4077, Kentucky Statutes, being merely a tax on the intangible property of the corporation, the city has by this ordinance no contract right that this tax shall always be paid, and when the corporation sold out and no longer had any intangible property, the right of the city to collect a franchise tax from it was at an end. No right of the city has

been violated by the amendment of the articles of incorporation, or by the sale of the bridge property to the Louisville & Nashville Railroad Company; for the city had no right to demand that the Bridge Company should continue in existence, and thus continue to be liable for a franchise tax to it. When it collects its tax on the physical property its contract right is satisfied. The franchise of the Henderson Bridge Company is now owned by the Louisville & Nashville Railroad Company, and the value of this franchise goes to swell the value of the franchise of the Louisville & Nashville Railroad Company. The fact that the city does not receive as much tax from the railroad company as it did from the Bridge Company is no more material than if the city got a larger sum from the railroad company than it would get from the Bridge Company. Taxation laws must be uniform, and it is impossible to avoid occasional inequalities. The Bridge Company having the legal right to sell out and having exercised its right in a legal manner, the city cannot complain.

Under sections 4096 and 4098, Kentucky Statutes, the physical properties of the Bridge Company are to be valued "for the purpose of being operated as a carrier of freight and passengers," including engines and cars, depot grounds and improvements and other real estate. When the physical property of the Bridge Company is assessed under this rule and the city collects its taxes on the assessment it collects taxes "on the approaches to said bridge or any building erected by said Bridge Company within the corporate limits of said city, the bridge itself and all appurtenances thereto, within the limits of said city," as provided in the ordinance. The city has no vested right to anything more. If the Legislature should repeal sections 4077-4081, Kentucky Statutes, and make no provision for a franchise tax, leaving the law as it was in 1882 when the contract was made, the city could not complain.

Judgment reversed and cause remanded for a judgment as above indicated. Judge Turner dissents.

**Chesapeake & Ohio Railway Company v. Robbins.**

(Decided June 20, 1913).

**Appeal from Bath Circuit Court.**

**Damages—Overflow from Obstruction of Creek—Negligence—Omission to Pass on Question Raised by Cross Appeal—Extension of Opinion.**—In the original opinion in 154 Ky., 387, the question raised by appellee's cross appeal was inadvertently overlooked. The claim for damages arising out of the overflow of the personal property was properly pleaded, and its consequent injury sufficiently alleged. There was no question of limitation, and appellee's right to a recovery of damages for the injury to the personal property is apparently as valid as was her claim for damages for injuries sustained to her real estate, and the lower court erred in sustaining the demurrer to the amended petition, so the judgment sustaining the demurrer to the amended petition is reversed, though the judgment from which the main appeal was prosecuted was properly affirmed.

SHELBY & SHELBY, LEWIS APPERSON, R. N. NORTHCUTT  
and H. C. GUDGELL for appellant.

C. W. GOODPASTER, JOHN A. DAUGHERTY for appellee.

**EXTENSION OF THE OPINION BY JUDGE SETTLE—Reversing on Cross Appeal.**

In the opinion handed down in this case we inadvertently overlooked and omitted to pass on, the question raised by appellee's cross appeal. It appears from the record that after the principle issues had been completed, appellee filed an amended petition, wherein it was, in substance, alleged that at the time of the first overflow of her lots and houses by the alleged obstruction of the waters of Salt Lick and Mud Lick Creeks from the abutments, piers and embankments, connected with appellant's bridges over those streams, she owned and had in one of the houses household goods of value, which were subjected to overflow and thereby damaged to the amount of \$205. For some reason not stated in the record, the circuit court sustained a demurrer to the amended petition, to which appellee, at the time excepted, and the cross appeal presents for review this ruling. We think the court erred in sustaining the demurrer. The claim for damages arising out of the overflow of appellee's personal property was properly pleaded and its consequent injury sufficiently alleged. There was no question of

limitation, and appellee's right to a recovery of damages for the injury to the personal property, is apparently as valid as was her claim to damages for the injuries sustained, from the same cause, and at the same time, to her real estate. If she had a right of action for the latter she has for the former, on the grounds stated in the original opinion. At any rate she should have been allowed an opportunity to establish her right to the damages to the personal property claimed. So while the judgment, from which the main or original appeal was prosecuted, was properly affirmed, the judgment sustaining the demurrer to the amended petition must be and is reversed on the cross appeal, and remanded for a trial as to the question of damages claimed to the personal property.

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### **Campbell v. Mobile & Ohio Railroad Company.**

#### **Campbell v. Same.**

(Decided June 20, 1913).

#### **Appeals from Hickman Circuit Court.**

1. Railroads—Action for Killing of Live Stock at a Crossing—Presumption of Negligence.—In an action against a railroad company for the killing of live stock at a grade crossing, the burden being upon the company to overcome the presumption of negligence, and it having failed to show a compliance with section 786 of the Kentucky Statutes, that presumption was not overcome.
2. Railroads—Negligence Imputed by Section 809 Ky. Stats.—Signals.—On the question of whether a railroad has relieved itself of the negligence imputed to it by section 809, Ky. Stats., where cattle are killed at a highway grade crossing, until it has shown that it gave the necessary signals as provided in section 786, there has been put one opinion by this court, and it seems to assume that where the company sought to overcome the prima facie case against it, that it must show that the signals for the crossing were given as required by the section. (See 22 R., 666).
3. Railroads—Signals at Crossings—Section 786 Ky. Stats.—There is nothing in the language of section 786 of the Kentucky Statutes from which it might be inferred that its requirements were intended only for the protection of human beings; it is sufficiently broad to hold the company negligent for a failure to observe its provisions whether men or stock may be killed or injured at a grade crossing if its provisions are violated.

BENNETT, ROBBINS & THOMAS for appellant.

E. T. BULLOCK for appellee.

OPINION OF THE COURT BY JUDGE TURNER—Reversing.

On the morning of September 16, 1911, about 3:20 a. m., appellee's South-bound fast train running at the rate of fifty-five miles an hour killed two horses at a grade crossing in Hickman county.

One of the horses belonged to appellant, R. L. Campbell, and the other to Mrs. Jennie Campbell. The two actions by agreement were heard together in the lower court, and will be heard together here.

The court after the introduction of all the evidence gave a peremptory instruction to find for the defendant, and the plaintiffs appeal.

The court placed the burden of proof on the defendant, and it introduced the engineer and fireman in charge of the train, who were the only eye witnesses to the occurrence. They stated in substance, that the train was a little late and was running about fifty-five miles an hour; that the crossing in question is on a curve, and North of the crossing and in this curve is a cut; that upon the occasion in question, the fireman was on the East side of the cab, which was the outside of the curve, and the engineer was on the West side; that in the dirt road just East of the railroad crossing was a depression, and that by reason of the cut in the curve and the depression in the dirt road, stock approaching the crossing from the East on the dirt road could not be seen for a very great distance. The fireman stated that he was looking out and when from 60 to 100 feet from the crossing, for the first time, he saw several horses rapidly running on the dirt road toward the crossing from the East, and immediately notified the engineer, but that before anything could be done, and almost simultaneously with such notification the engine and horses met on the crossing; that between the time he notified the engineer and the collision, there was no time to give the stock signal. They state they did not give the stock signal or put on the brakes after discovering the stock because there was no time to do so. The train was equipped with an electric headlight, and modern air-brakes which were in perfect order. Neither of them stated whether or not the signal for the crossing was given as required by section 786 of the Kentucky Statutes.

The evidence of the plaintiffs was given by witnesses who were not present at the time of the injury, and who were not at the place of the injury for several hours thereafter; but they undertake to state such facts locating the bodies of the two horses, the places where blood was seen, and other signs indicating the point where the horses were struck and that certain tracks were seen on the West side of the railroad indicating that some horses had approached from that side and that no tracks were then discernible approaching the crossing from the East side; and from these circumstances it is argued that the physical facts disclose a state of case which justified a submission to the jury of the question of negligence. The evidence further shows that each of the horses were struck on the rump by the engine and thrown to the West side of the track; this fact, if it shows anything, is an indication that the horses were going from East to West as testified to by the fireman and engineer, and were almost across the track when struck; if they had been struck on the rump while going from West to East, it seems that they would have been knocked off on the East side of the track.

The engineer and fireman are unimpeached, their testimony is clear, explicit and easily understood and they fully agree about it. From our understanding of the physical facts and the location of the ground, they furnish no sufficient ground for submission of the question of negligence to the jury in the face of the testimony of the engineer and fireman, if there was no negligence before the train men discovered the horses.

Section 809 of the Kentucky Statutes provides, among other things:

“And the killing or injury of cattle by the engine or cars of any company shall be *prima facie* evidence of negligence and carelessness on the part of the company, its agents and servants.”

Section 786 of the Kentucky Statutes is as follows:

“Every company shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such bell shall be rung, or whistle sounded, outside of incorporated cities and towns, at a distance of at least fifty rods from the place where the road crosses upon the same level any highway or crossing, at which a sign-board is required to be maintained, and such bell shall be rung or whistle sounded contin-



nously or alternately until the engine has reached such highway crossing."

The question is, has a railroad company relieved itself of the negligence imputed to it by section 809 where cattle are killed by its engine or cars at a highway grade crossing, until it has shown that it gave the signals for the crossing as provided in section 786? On this question there has been but one opinion by this court, which we have found, and that a very short one which does not give the facts of that case; but it seems to assume that where the company sought to overcome the *prima facie* case against it, that it must show that the signals for the crossing were given as required by the section quoted. (*Mobile & Ohio R. R. Co. v. Roper*, 22 R., 666).

Whether the signals required by section 786 are alone for the benefit of persons about to cross the track on highways, or whether they are also intended to warn or frighten animals unaccompanied by persons, has not so far as we are aware been determined by this court, except in the case referred to. Elliott on Railroads, Vol. 3, Section 1206, takes this view of it, to-wit:

"In nearly all, if not quite all, of the states statutes are in force requiring railway companies at certain distances from crossings to sound the whistle of the locomotive and to ring the bell. The obvious purpose of such signals is to give notice of the approach of trains. Such signals, it seems, are not required alone for the benefit of persons about to cross the track but are also required to warn and frighten animals away from the track. Where animals are injured on the track of a railway company proof of the omission to give statutory signals may be evidence of negligence. The failure to give such signals is not actionable negligence per se, but there are authorities which hold that proof of an injury to the animal and proof of a failure to give statutory signals make a *prima facie* case for the plaintiff."

The case of *Hohl v. Chicago, Milwaukee & St. Paul Ry. Co.*, 61 Minn., 321 (52 American State Reports, 598) was where a colt was killed at a highway crossing at night, and the question we are here dealing with arose in that case and the court said:

"It was the duty of the engineer in charge of the locomotive in this case to give the signals at the crossing or cause them to be given. A failure to do so is a misdemeanor; Gen. Stats., 1894, sec. 6637. It is not the province of the court to ingraft upon this statute any limita-

tions not necessarily implied from the language used, and in as much as the giving of such signals has a tendency in some cases to frighten animals from the railway track, we must presume that this was one of the results intended to be secured by the enactment of the law; hence an omission to comply with the statute in this case was evidence of negligence on the part of the defendant, but whether such omission was the cause of the accident or not was a question for the jury. *Palmer v. St. Paul, etc. R. R. Co.*, 38 Minn., 415."

In Missouri they have a statute very similar to our own requiring the giving of signals upon the approach of trains to highway crossings, and in the case of *Owens v. Hannibal & St. Joseph R. R. Co.*, 58 Mo., 386, it was held that that statute was intended for the protection of stock as well as for persons.

There is nothing in the language of section 786 from which it might be inferred that its requirements were intended only for the protection of human beings; it is sufficiently broad to hold the company negligent for a failure to observe its provisions whether men or stock may be killed or injured at a grade crossing if its provisions are violated.

The burden being on the company to overcome the presumption of negligence, and it having failed to show a compliance with the provisions of section 786, that presumption was not overcome.

The judgment is reversed for a new trial, and for further proceedings consistent herewith.

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### **Wendt v. Berry, Trustee.**

(Decided June 20, 1913).

#### **Appeal from Campbell Circuit Court.**

1. **Officers—Powers of De Facto Officers Acting Under Unconstitutional Act.**—State, county, district or municipal officers acting under authority of a legislative act are de facto officers, although the act may be declared unconstitutional and all acts done by such officers before the legislation creating the office has been declared invalid, are binding upon the public and third persons.
2. **Officers—Powers of De Facto Officers of Municipal Corporations.**—Where a city was created by an act of the Legislature, and a city government organized under the act, and contracts for street improvements made conformable to the general laws governing

such a city, the contractor who made the improvements may enforce his claim against the property owner and the property as fully as if the act creating the city was valid, although subsequent to the making of the improvement but before they were paid for the act creating the city was held to be unconstitutional.

8. **Officers—De Facto Officers Defined.**—A de facto officer is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office are exercised, first, without a known appointment or election, but under such circumstances of reputation or acquiescence as are calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of an election or an appointment by or pursuant to an unconstitutional law before the same is adjudged to be such.

WM. U. WARREN for appellant.

BAILEY & VEITH BRENT SPENCE for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

In 1888 the Legislature of the State created the District of Clifton in Campbell County and established therein a form of municipal government very similar to the form of government of the cities of the state, although the district was not in fact either a city or a town. The district thus established and governed continued in existence until 1910 when by an Act of the Legislature it was converted into a city of the fifth class under the name of the city of Clifton. After the enactment of this legislation, a city government was duly and regularly organized and the affairs of the city administered in conformity to the laws governing cities of the fifth class, and this government was continued until 1912, when the Act of the Legislature converting the district of Clifton into a city of the fifth class was held unconstitutional by this court in *Hurley v. Motz*, 151 Ky., 451. Shortly after the opinion in this case was handed down, the government of the district of Clifton was re-established and the affairs of the district have since been administered as they were before the district was converted into a city.

Some time after the establishment of the city government pursuant to the legislative act of 1910, certain original street construction was ordered to be made by the city council and completed in the manner provided in the laws governing fifth class cities; but before the coun-

cil had opportunity to accept the work, the act establishing the city had been declared invalid. When the district of Clifton was re-established, the appellant contractor, who did some of the work of construction, applied to the governing authorities of the district to accept and approve it, and the work was accepted and approved in the manner pointed out in the act creating the district, and thereupon he brought this suit to enforce a lien for the cost of the construction on property owned by the appellee. A general demurrer was sustained to the petition of the contractor as amended, and, declining to plead further, the suit was dismissed and this appeal prosecuted.

The appellee resists the enforcement of a lien upon his property and the recovery of the amount due for the construction, upon the single ground that all of the ordinances and contracts in relation thereto, made and entered into by the governing authorities of the city of Clifton, were without force or effect because the act under which the city was set up was void from the beginning and therefore all ordinances, contracts and other things made and done by the persons exercising the powers of officers of the city during the time the city government was administered under the legislative Act were a nullity and did not confer any right or create any liability.

In opposition to this view, it is urged on behalf of the appellant contractor that the persons who composed the municipal government of the city of Clifton, while it was assuming to be a city of the fifth class, were *de facto* officers, and the appellee, who received the benefit of contracts made by these *de facto* officers, should not be allowed to escape the payment of the sum due for the improvements with which his property is charged.

Putting aside the argument that the improvements with which appellee's property is charged were made with his consent and by his request, and he is therefore estopped to deny his liability, and the further argument that, as the improvements made during the supposed existence of the city government were adopted by the district government after its re-establishment, this adoption and acceptance had the same effect as if the improvements had been ordered by the district government and had been completed and accepted under its management,

it will be seen that the issue in the case, although an important one, may be put in few words and thus stated:

Where a city government is organized under an unconstitutional act, can persons, who, during the existence of the city government so organized, received benefits therefrom, defeat the payment of the amount due the contractor for the benefits upon the sole ground that the city government was a void thing from the beginning, and the persons acting as its officers were without authority to create any enforceable demands growing out of contracts entered into by and with them at a time when the officers of the city, the contractor and the property owners believed that the city government was a legal municipal organization?

There is much conflict in the cases in which this question has been considered, some of the courts holding that there cannot be a *de facto* officer unless there is a *de jure* office, and so where officers are exercising authority under an unconstitutional act, everything they do in exercising the functions of the offices they hold is void, as an unconstitutional law is no law and furnishes no authority to persons assuming to perform duties under it; while there is another line of cases holding that, although an act of the Legislature may be declared unconstitutional, the acts of officers who assume to exercise authority under it are binding upon the public and third parties until the legislation has been declared invalid. One of the leading cases on this subject is *Hildreth v. McIntire*, 1 J. J. Mar., 206, In that case there was involved a question growing out of the conflict between a court of appeals organized under and in conformity to the Constitution of the State and a court of appeals created by an act of the Legislature of the State, which body having become offended at some decisions of the constitutional court, undertook to abolish it and set up in its place a legislative court. In holding that this legislative court was not a *de facto* body or entitled to exercise any of the functions of a judicial tribunal, the court rested its decision distinctly upon the ground that there could not be a *de facto* judicial tribunal, exercising power and authority at the time the office it assumed to discharge the duties of was filled by constitutionally appointed judges, saying:

“But when the Constitution, or form of government, remains unaltered and supreme, there can be no *de facto* department, or *de facto* office. The acts of the incumbents of such department, or office, can not be enforced conformably to the Constitution, and can be re-

garded as valid, only when the government is overturned. When there is a constitutional executive and Legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky, as a '*de facto*' court of appeals. There can be no such court, whilst the Constitution has life and power. There has been none such.

"There might be under our Constitution, and there have been '*de facto*' officers. But there never was and never can be, under the present constitution, a '*de facto*' office.

"The gentlemen who directed the appeal in this case to be dismissed, and the one who certified the order, did not hold office in the court of appeals. The Legislature had attempted to abolish the court of appeals, ordained and established by the Constitution, and create, in its stead, a new court. This attempt was ineffectual for want of legislative power. The offices attempted to be created, never had a constitutional existence; and those who claimed to hold them, had no rightful or legal power. They were not appointed to the court of appeals, fixed by the Constitution. They did not claim to exercise the functions of this court. Their tribunal claimed to derive its origin from the fiat of the Legislature. The Court of Appeals, had not been, and could not be abolished. Its judges had not been removed from office, and were acting and ready to continue acting as judges. The act of the Legislature did not intend to superadd four judges to the number already in office in the court of appeals. It can not receive, and never has received such a construction.

"The gentlemen who acted as judges of the legislative tribunal, did not claim to be, and certainly were not associates of the judges of the constitutional court. They were not their successors. They were not the incumbents or *de jure* or *de facto* officers. Nor were they *de facto* officers of *de jure* offices. For if such a thing could be, as a *de facto* judge of the Court of appeals, of the Constitution, these gentlemen did not hold any such place, for the reasons before assigned. They had no official rights or powers."

In Nagel v. Bosworth, Auditor, 148 Ky., 807, the question was presented as to the validity of the acts of John T. Hodge while he was acting as judge of the Campbell Circuit Court under an act of the Legislature that

was subsequently declared unconstitutional. In holding that Judge Hodge was a *de facto* officer, and his judicial acts before the statute under which he was exercising the functions of the office was adjudged unconstitutional, were valid, the court distinguished the case of Hildreth v. McIntire, saying:

"In that case the Legislature undertook, by statute, to abolish the Court of Appeals established by the Constitution and to create another Court of Appeals, in lieu of it. The act, on its face, was a palpable violation of the Constitution, as the Legislature was without power to create a Court of Appeals; but not so is the act here. The Legislature has power to create a circuit court, and, under certain conditions, to add an additional judge. The act that it passed showed that the conditions existed which warranted it to create an additional judge. The act, on its face, was within the power of the Legislature, and upon considerations of sound public policy, litigants who have tried their cases before Judge Hodge should not be sufferers by reason of the unconstitutionality of the statute."

Although on a casual inspection there would appear to be no substantial difference in the facts of these two cases, a careful examination will disclose that there is a marked distinction between them, and that each case rests on different, but sound principles. In the Hildreth case the court ruled that there could not be *de facto* judges of the Court of Appeals of Kentucky assuming to act under a void legislative act at a time when legally selected judges were exercising the duty and were holding the office of judges of the court. The fact that other legally elected officers were in existence when the usurpers undertook to perform the duties of the office was the turning point in this case and it was this condition that influenced the court in holding that the acts of the usurpers were void. But in the Nagel case there was no judge claiming the office or exercising the functions of the office that Hodge had been inducted into under the void legislative act. There was no doubt of his right to the office if the act creating it was valid. Under these circumstances we held that he was a *de facto* officer. The same conclusion was reached by the Connecticut court in *Brown v. O'Connell*, 36 Conn., 432, 4 Am. Rep., 89, where the court said in substance that a judicial officer appointed pursuant to an act of the Legislature afterwards declared unconstitutional, was

a *de facto* officer, and his acts while exercising the duties of the office were binding upon the public and third persons.

In *Riley v. Garfield Township*, 58 Kansas, 299, the court also adopted the view that the acts of public officers while they were performing the duties of the office were valid, although the law creating the office was afterwards declared unconstitutional.

In *Burt v. Winona & St. Peter Railroad Company*, the Minnesota court in 31 Minn., page 472, said "that where a court or office had been established by an act of the Legislature apparently valid, and the court had gone into operation, or the office is filled and exercised under such act, it is to be regarded as a *de facto* court or office—in other words, that the people shall not be made to suffer because misled by the apparent legality of such public institutions."

In *Cooley's Constitutional Limitations*, page 750, it is said, after defining a *de facto* officer that "for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers *de facto* are not suffered to be questioned because of the want of legal authority, except by some direct proceeding instituted for the purpose by the State or by some one claiming the office *de jure* or except when the person himself attempts to build up some right or claim, some privilege or emolument, by reason of being the officer which he claims to be. In all cases the acts of an officer *de facto* are as valid and effectual while he is suffered to retain the office as though he was an officer by right, and the same legal consequences will follow from them for the protection of the public and of third parties."

In *Thompson v. Couch*, 144 Mich., 671, the court said: "It is contended, however, that there cannot be a *de facto* officer of an office which has no existence, and that if the amendatory act is unconstitutional the respondent cannot be held to be a *de facto* incumbent of an existing office. There are cases which hold that, as an unconstitutional statute is not law, such statute creating an office does not give color of right to an incumbent. But where this is held, the holding is said not to be inconsistent with the rule that one chosen under color of an election, or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be so, is an officer *de facto*. While there can be no such thing as a



*de facto* office, there may be a *de facto* officer, whose apparent right arises out of action taken by the electorate or the appointing power under the supposed authority of an unconstitutional law before the same is declared unconstitutional."

In *Speer v. Board of County Commissioners*, 88 Fed., 749, the court, in holding that the acts of public officers, exercising authority under a statute afterwards declared invalid, were binding upon the public and third parties, said: "Until the judiciary has declared it void, men act and contract, and they ought to act and contract, on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts have affected public interests or private rights, they must be treated as valid and lawful. The acts of a *de facto* corporation or officer under an unconstitutional law before its invalidity is challenged in or declared by the judicial department of the government cannot be avoided, as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity, by any *ex post facto* declaration or decision that the law under which they acted was void."

In *Commonwealth v. McCombs*, 56 Pa. St., 436, the Pennsylvania court said: "An Act of assembly, even if it be unconstitutional, is sufficient to give color of title, and an officer acting under it is an officer *de facto*." To the same effect is *Ashley v. Board of Supervisors*, 60 Fed., 55.

In *Lang v. Bayonne*, 74 N. J. L., 455, also reported in 15 L. R. A. (n. s.) 93 and 12 A. & E. Ann. Cases, 961, the court, after reviewing a number of authorities, said "that an officer appointed under authority of a statute to fill an office created by the statute is at least a *de facto* officer and that acts done by him antecedent to a judicial declaration that the statute is unconstitutional and void, are valid so far as they involve the interests of the public and third persons." In the full notes to this case in the L. R. A. and A. & E. Ann. Cases there will be found a review of all the cases bearing upon this question.

The leading case upon the other side of this question is *Norton v. Shelby County*, 118 U. S., 425, 30 L. Ed., 178. In that case the Supreme Court said: "An unconstitutional act is not a law. It confers no rights; it imposes no duties; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed;" and laid down the doctrine that the acts of

public officers exercising authority under an unconstitutional law were not binding upon the public or any one else. This case, although having great weight on account of the distinguished judge who wrote it and the court for whom he spoke, has not been followed at all by a number of state courts, or in its entirety by even the Federal courts, as may be seen by an examination of the Federal case, *supra*, in which this case was distinguished upon rather narrow grounds, leaving the impression that the court drawing the distinction was not disposed to fully adopt the broad doctrine announced in the Norton case, that an unconstitutional act conferred no rights and created no liabilities, and nothing done under it was binding upon any person.

In Norton v. Shelby County, the Supreme Court adopted as sound the definitions of a *de facto* officer laid down as follows in State v. Carroll, 38 Conn., 449: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon the principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised:

"First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like.

"Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being known to the public.

"Fourth. Under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such."

These definitions appear to us to be exceptionally well stated, and to cover fully every state of case in which the authority of a *de facto* officer may be exercised. The facts of the case we have, bring it easily within both the first and fourth of the definitions given. Here the municipal government of the city of Clifton was

organized pursuant to an act of the Legislature of the State that conferred upon the officers all the powers they assumed to exercise and gave them the right to create the liabilities they did create in the construction of street improvements and to impose upon the property holders the burden they did impose arising out of these improvements. At the time these improvements were made, and at all times from the establishment of the city under the legislative act, until the act was held unconstitutional, the persons exercising the powers of officers of the municipality, the people of the city, the property owners and contractors, and the public generally, believed, and had a right to believe, that the organization of the city was legal. Acting under this assumption, indulged in by every person in any manner connected with the administration of the affairs of the city either in an official or private capacity, the city authorities discharged without question or protest all of the duties belonging to their respective offices. Under these circumstances it would not only be a manifest injustice but a positive wrong to deny to the acts of these officers the validity to which acts of legally elected officers are entitled.

As the principles upon which the validity of the acts of *de facto* officers rest are not defined by either Constitution or statute, and the courts are free, except as they may feel bound by precedent, to adopt such views as will best subserve the ends of justice, it would be a signal and unfortunate demonstration of the inability of the courts, when unrestrained by legislative enactment or judicial precedent, to administer the law according to the rights of the case if the appellant contractor should be denied the relief sought. To say that the property owner should be allowed to receive and retain substantial and permanent benefits to his property without compensating the contractor whose labor furnished the benefits, and to turn the contractor out of court empty handed, would be a departure from the principles that have at all times controlled this court in the decisions of cases where it was free to exercise its discretion.

Acts of the Legislature are presumed to be valid until declared void by the courts. The people generally and rightfully so regard them. The power and authority of public officers who exercise the duties of office under legislative enactments is recognized by all persons with whom they have dealings in their official capa-

city, and the public good imperatively demands that validity should be given to the acts of these officers when they are performing duties within the scope of their public authority. If individuals dealing with public officers might in every instance question their authority or deny their right to exercise the office until the courts of last resort had given the sanction of their approval to the validity of the legislation under which the office was established, the conduct of public affairs would be involved in interminable confusion and doubt. No person would feel secure either in his personal or his private rights. Confusion and uncertainty would attend every official act that was performed. Such a condition as this would be disastrous to the peace and welfare of society. It would encourage the lawless to persist in their offenses and make difficult the just enforcement of the law, as persons charged with this duty and willing to exercise it, would always be apprehensive of their right to do so.

Therefore, as the precise question here involved is a new one in this State, we feel at liberty to announce the rule, sound in principle, and supported by abundant authority, that the acts of public officers, whether they be state, county, district or municipal, created by an act of the Legislature, are valid as to the public and all persons having dealings with the officers antecedent to the time when the legislative act under which they were exercising authority was declared unconstitutional.

Wherefore, the judgment is reversed, with directions to enter a judgment in conformity with this opinion.

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### **Goolrick, et al. v. Wallace, et al.**

(Decided June 20, 1913.)

#### **Appeal from Shelby Circuit Court.**

**Evidence—Bills and Notes—Endorsers—Parol Evidence.**—Where a note is endorsed by two persons and the words "without recourse" are added to such endorsement and occupy such position with reference thereto that ambiguity arises as to which of said endorsements they are intended to apply, parol evidence is admissible to show to which endorsement such words are applicable.

**ELLERBE CARTER, DAYTON T. MITCHELL** for appellants.

**WILLIS, TODD & BOND and P. J. BEARD** for appellees.

## OPINION OF THE COURT BY JUDGE LASSING—Affirming.

Ralph Izzard executed and delivered his promissory note for \$3,405, of date June 8, 1910, payable to the order of Hart Wallace, at the Citizens Bank of Shelbyville, Ky., twelve months thereafter. Wallace endorsed and delivered the note to said bank for collection. Before its maturity, the payee of said note caused it to be endorsed by the bank "without recourse," sold and delivered it to C. O. Goolrick, F. M. Chichester and R. H. L. Chichester, and they are now the holders thereof. Because of its non-payment at maturity, the note was duly protested.

Thereafter, the holders of said note brought suit in equity in the Shelby Circuit Court against Hart Wallace, Nellie B. Wallace and the Citizens Bank of Shelbyville, Ky., to recover the amount of said note from Hart Wallace as endorser thereof and to subject to its payment the interest of said Wallace in certain real estate alleged to have been theretofore conveyed, in fraud of plaintiffs' rights, by Wallace to his wife, Nellie B. Wallace, and by her and her husband mortgaged to said bank; which mortgage it is asserted was fraudulent and preferential. Said note is endorsed as follows:

"Hart Wallace"  
 "Without Recourse"  
 —Pay—  
 Any Bank or Banker,  
 or order  
 Citizens Bank  
 Shelbyville, Ky.  
 J. C. Burnett, Cashier.

The defendant, Hart Wallace, filed an answer in five paragraphs. The first paragraph is a traverse; the second, an affirmative plea that he assigned the note without recourse; the third, before plaintiffs became the owners of the note, they, for value, agreed with defendant that his endorsement should be without recourse, and they took the

note with that understanding and agreement; fourth, that the words, "without recourse" written on the back of said note were intended and understood by him and plaintiffs, before they acquired same, to be an assignment of the note by him without recourse, and if such endorsement did not, in the manner in which it was made, effectuate the intention of the parties, the instrument should be reformed so as to express the true and real agreement; and fifth, that the maker of the note was the real party plaintiff, that he and the plaintiffs reside in the same county in the State of Virginia, that he had indemnified plaintiffs against loss on account of said note, and a conspiracy existed between plaintiffs and the maker whereby plaintiffs should recover of the defendant as endorser and he would then be forced to sue the maker of the note in the courts of the latter's residence, who would in such action assert a pretended set-off or counterclaim.

Nellie B. Wallace answered denying the allegations of fraud in connection with the transfer of said real estate by her husband to her, and in connection with its mortgage by them to the Citizens Bank, and in a second paragraph set out in detail the facts connected with each of said transactions. The Citizens Bank filed its answer in which it detailed the facts connected with the endorsement of said note by it and its co-defendant, Hart Wallace, and its sale and delivery to the plaintiffs. It also denied that there was either fraud or preference in the execution of the mortgage to it by Nellie B. Wallace and Hart Wallace. A reply to the several answers, controverting the allegations thereof, completed the issue. Proof was heard and upon submission of the case, the chancellor was of opinion that the evidence supported the plea that Hart Wallace had endorsed said note without recourse, and entered judgment dismissing the petition. Plaintiffs appeal.

The single question to be determined upon this appeal is the extent of the liability incurred by appellee, Hart Wallace, by endorsing the note in question. He admits endorsing the note, and if parol evidence may be considered for the purpose of determining the character of his endorsement, his claim that it was without recourse is fully supported and justified. Section 33 of the negotiable instruments act, which is chapter 90-b, Kentucky Statutes, provides: "An endorsement may be

either in blank or special, and it may also be either restrictive, or qualified, or conditional." Section 38 provides: "A qualified endorsement constitutes the endorser a mere assignor of the title to the instrument. It may be made by adding to the endorser's signature the words "without recourse" or any words of similar import. Such endorsement does not impair the negotiable character of the instrument."

If there appeared on the back of the note in question merely the signature of Hart Wallace, coupled with the words "without recourse," there would be no question that his was a qualified endorsement, and the holder of the note would have to look to the maker for payment. There also appears on the note the endorsement of the bank, and the words "without recourse" appear between the name of Hart Wallace and that of the bank. From their location, it might be fairly inferred that it was the intention of the person writing the words "without recourse" upon said note that they should apply to and limit the liability of the bank, but such inference is justified only by reason of the fact that the words "without recourse" are written above and parallel with the endorsement of the bank. The statute, however, provides that the endorsement may be qualified by adding to the endorser's signature "without recourse," or words of similar import. Strictly speaking, these words could not appear above the signature whose endorsement they were intended to qualify, but we do not feel that the statute should be given so narrow a construction and hold that the qualifying words should limit the liability of that endorsement to which they were intended to be applied when placed upon the instrument. If both of the endorsements had appeared upon the note above the words "without recourse" we would unhesitatingly hold that they applied to and limited the last endorsement; but, whereas, in the present case, it is impossible to tell, from the location of the qualifying words with reference to the endorsements upon the paper, to which endorsement they apply, the ends of justice require that oral evidence should be introduced to establish this fact. We, accordingly, hold that the court did not err in receiving oral evidence in order to determine whether or not the words "without recourse" applied to the endorsement of Hart Wallace or that of the bank.

This is an enunciation of no new principle, for in the recent case of *First National Bank v. Bickel*, 143

Ky., 754, after holding that the purpose of the statute under consideration was to exclude parol evidence and to make the written instrument control the rights of the parties, this court said:

“It may be shown by parol evidence under section 64, of the Negotiable Instrument Act, whether a person is an accommodation endorser or not, and it may be shown under section 68 as between endorsers what their liability is. But the purpose of both these provisions is merely to determine the liability of the endorsers between themselves. In other words, the purpose of these provisions is simply to allow parol evidence to show whose debt it is that the real debtor may be required as between the debtors themselves, to discharge his own debt rather than one who is secondarily liable for it. But this principle cannot be extended so as to impose upon the endorser a different obligation than the law ascribes to the writing which he executes.”

The purpose of an endorsement “without recourse” is to transfer the title to the instrument of writing to the purchaser, without creating any personal liability on the part of the one so transferring and endorsing it. The character of the instrument is, in no wise, modified or changed by permitting the introduction of parol evidence to show to whose endorsement the qualifying words apply, where there is more than one endorsement to which they might with equal propriety apply. In such case, it is impossible to determine, without the introduction of parol evidence, which endorser is entitled to the benefit of the qualifying words, and hence the necessity for its introduction.

In a note to *Doll v. Getzschmann*, 26 Am. & Eng. Ann. Cases, 880, quite a line of authorities is collated by the editor, which hold that parol evidence is admissible to show the time when an endorsement on a note was made. If parol evidence may be introduced to show the order in which endorsements were made upon a note, by parity of reasoning, it is equally apparent that such evidence should be admitted to establish to which of several endorsements, qualifying words found on the note should be applied.

It being competent for appellee to show, by parol evidence, that the qualifying words “without recourse” were placed upon the note to limit his liability, the chancellor correctly held that appellants were not entitled to recover.

Judgment affirmed.



**Daniel, et al. v. Commonwealth.**

(Decided June 20, 1913).

**Appeal from Owsley Circuit Court.**

1. **Indictment—Endorsement—Record.**—An indictment which bears on its cover an endorsement that it has been received from the hands of the foreman of the grand jury in its presence in open court and filed in open court which endorsement is signed by the clerk, is a sufficient compliance with the code, without such endorsement being copied into the order book.
2. **Indictment—Conspiracy—Sufficiency and Certainty.**—The purpose of an indictment is to advise the accused of the offense with which he stands charged and for which he is to be tried. An indictment for conspiracy, which charges the defendants with combining together for an unlawful purpose, and in furtherance of such unlawful purpose, they or some one of them or some unknown person acting with them committed the unlawful act, the others being then and there conveniently near aiding and abetting sufficiently charges all with being principals and the indictment is good.
3. **Criminal Law—Trial—Formation of Jury—Appeal—Review.**—Error of the court in the formation of a jury to try one charged with a crime or offense is not subject to review by the court of appeals.
4. **Homicide—Evidence—Dying Declarations—Admissibility.**—In a prosecution for homicide, statements of the injured party, made under a positive and absolute belief that his death is certain to ensue, and death results, are admissible as dying declarations, without regard to length of time intervening between the time of making the statements and his death.
5. **Homicide—Conspiracy—Trial—Instructions.**—In a prosecution for homicide as a result of conspiracy, instructions are not erroneous, under which the jury, before it was authorized to find any one of the accused guilty, it was necessary to find from the evidence, beyond a reasonable doubt, first, that a conspiracy had been formed by the accused, to commit murder, second, that, in pursuance of said conspiracy, murder was committed by one or more of the accused, or by some other unknown person or persons, and third, that the others of accused were then and there present or conveniently near aiding them in so doing.
6. **Homicide—Conspiracy—Appeal—Review—Evidence—Weight and Sufficiency.**—In a prosecution for homicide as a result of conspiracy, evidence held to support verdict and judgment.

A. H. PATTON, C. W. HOGG, H. C. EVERSOLE and WILLIAM CLARK for appellants.

JAMES GARNETT, Attorney General; OVERTON S. HOGAN, Assistant Attorney General for appellee.

## OPINION OF THE COURT BY JUDGE LASSING—Affirming.

The grand jury of Owsley County, at its June, 1912, term, returned an indictment against Bradley Daniel, Jerry Rice, W. E. Rice, Ben Rice, E. C. Garnett, Robert Brandenburg, Harvey Sandlin, Ancil Vires and James Smith, charging them with the willful murder of Wilson Gabbard, by conspiring and confederating together and with each other and other persons, unknown to the grand jury, to kill and murder said Gabbard, and, in pursuance and furtherance of said conspiracy, actually killing him or causing him to be killed. The indictment is, in words and figures, as follows:

“The grand jury of Owsley County, in the name and by the authority of the Commonwealth of Kentucky accuse Bradley Daniel, Jerry Rice, W. E. Rice, Ben Rice, E. C. Garrett, Robert Brandenburgh, Harvey Sandlin, Ancil Vires and James Smith of the crime of willful murder committed in manner and form as follows:

The said Bradley Daniel, Jerry Rice, W. E. Rice, Ben Rice, E. C. Garrett, Robert Brandenburgh, Harvey Sandlin, Ancil Vires and James Smith and other persons to this grand jury unknown in the said county of Owsley and State of Kentucky on the 8th day of June, 1912, and before the finding of this indictment unlawfully, willfully, feloniously and of their malice aforethought and with intent to bring about the death of Wilson Gabbard and procure him murdered, did conspire together and with each other and with other persons to the grand jury unknown and the said Bradley Daniel and Jerry Rice and other persons to this grand jury unknown in pursuance of said conspiracy and in furtherance of same and while said conspiracy existed did on the said 8th day of June in Owsley County, Kentucky, and before the finding of this indictment unlawfully, willfully, feloniously and of their malice aforethought shoot and wound the said Wilson Gabbard with guns and pistols loaded with powder and ball and other hard and explosive substances from which shooting and wounding the said Gabbard died, and the said W. E. Rice, Ben Rice, E. C. Garrett, Robert Brandenburgh, Harvey Sandlin, Ancil Vires and James Smith in Owsley County, Kentucky, on the said 8th day of June, 1912, and before the finding of this indictment did unlawfully, willfully, feloniously and of their malice and aforethought, counsel, advise, encourage, aid and procure the said Bradley

Daniel and Jerry Rice and other persons acting with them but unknown to the grand jury, unlawfully, willfully, feloniously and of their malice aforethought to kill and murder the said Wilson Gabbard, which one of the last named (Bradley Daniel and Jerry Rice) or another person acting with them, but who is to this grand jury unknown, so as aforesaid then and there, thereunto by the said W. E. Rice, Ben Rice, E. C. Garrett, Robert Brandenburg, Harvey Sandlin, Ancil Vires and James Smith before the fact counseled, advised, encouraged, aided and procured, did, by shooting and wounding the said Wilson Gabbard with guns and pistols loaded with powder and ball and other hard and explosive substances and from which said shooting and wounding the said Wilson Gabbard died.

“Against the peace and dignity of the Commonwealth of Kentucky.”

Each of the accused entered a plea of not guilty. Upon trial before a jury Bradley Daniel, Jerry Rice, James Smith, W. E. Rice, Ancil Vires and Harvey Sandlin were found guilty, as charged in the indictment, and their punishment fixed at confinement in the penitentiary for life. E. C. Garrett and Ben Rice were, by the jury, found not guilty. On his own motion, the court peremptorily instructed the jury to find for Robert Brandenburg, which was done. A motion and grounds for a new trial was filed by the six defendants found guilty which being overruled, they prosecute this appeal and seek a reserall upon several grounds.

It is first insisted that the indictment is defective and a demurrer thereto should have been sustained. This contention is rested upon the idea that the record does not show that the indictment was filed in court. The indictment is endorsed “True Bill” and this endorsement is signed by the clerk. Section 121 of the Criminal Code provides: “The indictment must be presented by the foreman in the presence of the grand jury to the court, and filed with the clerk and remain in his office as a public record.” The record in this case shows that the indictment bears upon its cover the following endorsement: “Received from the hands of the foreman of the grand jury in the presence of the grand jury in open court and filed in open court this July 2, 1912. Ike Wilder, Clerk.” This is a literal compliance with the provisions of the statute, and we fail to see wherein any just ground of complaint is afforded appellants, even

though the record book of the circuit court does not contain a copy of this endorsement.

It is next insisted that the indictment is defective because it does not charge all of the defendants with being principals. True, it does not charge all with doing the shooting, but it does charge all with entering into a conspiracy for the purpose of encompassing the death of Wilson Gabbard, and, in furtherance of said conspiracy, of actually killing him, all being present aiding, counseling, advising, abetting and assisting in the killing while it was being done. A similar objection was made to an indictment, in all of its essentials like the one under consideration in the cases of *Commonwealth v. Hargis*, 124 Ky., 356, and *Anderson v. Commonwealth*, 144 Ky., 215. The question was elaborately discussed in those two opinions, particularly in the latter, and it is unnecessary to further consider it here. The purpose of the indictment is to advise the accused of the offense with which he stands charged and for which he is to be tried. If the indictment meets these requisites, the demands of the law are fully satisfied.

The language used in the indictment under consideration makes plain three propositions: First, that the accused banded themselves together for the purpose of killing Wilson Gabbard; second, that, in furtherance of said arrangement or conspiracy so to do, they or some one of them did actually kill him; and third, the others being then and there present or conveniently near, aided and assisted in so doing. The indictment was good, and the trial court properly overruled the demurrer thereto.

It is next complained that the court erred in sending to Jackson County for a venire of men, over the objection of appellants, from which the jury which tried appellants was made up. It appears that, when the case was called for trial, the Commonwealth's attorney made a motion under section 1112, Kentucky Statutes, for a change of venue. This motion was overruled. Thereupon, he filed a petition for a change of venue, notice being waived by appellants. On this motion the court heard proof at length, after which he again overruled the motion for a change of venue, and upon his own motion and over the objection of the accused, sent to Jackson County an order for a venire of sixty men, from which the jury was to be made up. It is insisted that this was error.

No complaint is made that the jury, which tried appellants, was not a lawful jury, or that any man who sat thereon was not qualified to sit in the case, but it is urged that the accused had a constitutional right to be tried by a jury of the vicinage, and that the court was without power or authority to send into another county for a jury, until he had satisfied himself by actual effort that no jury could be procured in that county to try the case. The cases of *Wilson v. Commonwealth*, 140 Ky., 1, *Spencer v. Commonwealth*, 122 S. W., 800; *Collins v. Commonwealth*, 143 Ky., 60; *Blanton v. Commonwealth*, 147 Ky., 812, and *Commonwealth v. Harris*, 147 Ky., 702, are relied upon as supporting this position. It is further urged that the very fact that the court found that there was no necessity for a change of venue is the best evidence that he erred in sending into another county for a jury.

It is likewise urged that, if a jury had been procured from Owsley County, they would necessarily have been more or less acquainted with the witnesses who testified in the case, and with their character and general reputation, and in this way have been better able to judge of their credibility. Counsel for appellants seem to have overlooked the fact that it is the duty of a jury to try the case by the evidence before them rather than from any personal knowledge they might have of the witnesses and their credibility. If the witnesses, who were introduced before the jury, were not worthy of belief, counsel might have established this fact by evidence, but they cannot complain that the court erred in permitting the case to be tried by jurors, whose acquaintance with the witnesses was not such as to enable them to pass upon their credibility without the aid of evidence.

The record shows that the court heard evidence upon the question of the change of venue and, while there is no transcript of that evidence before us, we must presume that a state of facts was there developed which justified him in sending into another county for a jury. The record shows that there was a great array of witnesses in this case, and he doubtless found it more convenient to the witnesses and litigants to procure a jury from another county than to transfer the case. But, whatever may have been his reason for so doing, he merely exercised that discretion which the law gives him in determining questions of this character. As said in *Hargis v. Commonwealth*, 135 Ky., 578, "The circuit court

has a wide discretion in matters of this sort, and this court will not interfere where the discretion has not been abused. The trial was had in the county of Estill, and a large part of the jury was brought from Madison County. The case had been tried once before, and the circuit judge finds as a fact that he could not obtain a jury in Estill County after having made a fair effort in good faith to obtain a qualified jury free from bias, by reason among other things, of the wide circulation given the facts of the case. Matters of this sort are by section 281 of the Criminal Code of Practice, committed to the discretion of the circuit judge, and, as by that section no exception can be taken to his ruling, it is not subject to review here." To the same effect is *Sergent v. Commonwealth*, 133 Ky., 284.

But, it is insisted that by the act of the Legislature, approved March 23, 1910 (Acts 1910, Chap. 92), section 281 of the Criminal Code, was so amended as to authorize this court to consider and pass upon the correctness of the court's ruling in impaneling a jury. Section 281, as amended by the act of 1910, provides: "The decisions of the court upon challenges to the panel and for cause, or upon motions to set aside an indictment, shall not be subject to exception." Prior to the adoption of this amendment, this court was without authority to pass upon the correctness of the court's ruling upon a motion for a new trial. By this amendment, the words "and upon motions for a new trial" were stricken from section 281, thereby giving to this court power to review the action of the trial court in passing upon a motion for a new trial. There remained, however, the inhibition against the right of this court to review the action of the trial court in the formation of the jury. While this ground relied upon for reversal cannot avail, we are satisfied from a consideration of the record that the court did not abuse his discretion in sending into another county to secure a jury of fair-minded, disinterested, and impartial men to try appellants.

The next ground relied on for reversal is, error of the court in admitting incompetent evidence. This, in the main, consisted of dying declarations or statements of Wilson Gabbard. He was shot about six o'clock in the morning on Saturday June 8th. He died on Sunday night following, sometime between midnight and morning, so that he lived less than forty-eight hours from the time he was shot. He said, immediately after he was

shot, that he was going to die and he knew he was going to die, and to this statement he steadfastly adhered until he became unconscious a few hours before his death.

Upon this point, three witnesses testified. Two, from memory, and one from notes made at the time the statement was made to him by deceased, and it is of this evidence that complaint is made. Inasmuch as the written statement contained only facts about which the witnesses agreed, we fail to see wherein appellants were, in any wise, prejudiced by having it read to the jury instead of having the witness testify as to those facts from memory. Indeed, there is no contrariety of opinion among the witnesses as to what deceased said concerning the way and manner in which he was shot and who shot him. If this evidence was competent, we fail to see wherein the court erred in permitting as many witnesses as heard the statement to detail it to the jury.

As stated, he was shot about six o'clock in the morning and he told Mary Gabbard, his mother, who was the first person to reach him, that he was killed, that he was going to die, and that Jerry Rice and Bradley Daniel had shot him. The doctor did not reach him until about noon, or shortly after noon of the same day, and he told him, in substance, the same thing. Although the doctor, in order to buoy him up, told him that there was a chance for him to recover, he insisted that there was not and that he was going to die. Under a long line of authorities, this evidence must be held competent as dying declarations, unless it be held that they were made too great a length of time before the victim's death.

The former statement was made perhaps as long as thirty-six hours, and the latter about thirty hours, before his death. In *Wilson v. Commonwealth*, 22 Rep., 1251, it was held that a statement made and written the day before the death, when it appeared that the deceased had given up all hope of recovery, was properly admitted as a dying declaration. In *Burton v. Commonwealth*, 24 Rep., 1162, it was held that a dying declaration made eleven days before death was admissible.

The principle upon which evidence of this character is admissible at all is that the declarations are made under a sense of a speedy death, and although death may not result for several days after the declaration is made, if at the time it is made the person who makes it believes that he is going to die and has abandoned all hope of recovery, and death thereafter ensues as a result of the in-

jury, the statement is competent as a dying declaration. As stated by Wigmore in his excellent work on Evidence, Vol. II, section 1440: "It follows, from the general principle, that the belief must be, not merely of the possibility of death, nor even of its probability, but of its certainty. A less stringent rule might with safety have been adopted; but this is the accepted one. The tests have been variously phrased; there must be 'no hope of recovery;' 'a settled expectation of death;' 'an undoubting belief.' Their general effect is the same. The essential idea is that the belief should be a positive and absolute one, not limited by doubts or reserves; so that no room is left for the operation of worldly motives."

When a statement is made under such circumstances, the law presumes that the solemnity of the occasion supplies the place of the oath, the state of mind, in which the one making such utterances at the time, being assumed as calculated to free it from all ordinary motives to misstate the truth. As early as 1595, the dramatist, Melun, thus portrayed the frame of mind of one whose statement might be received as a dying declaration:

"Have I not hideous death within my view,  
Retaining but a quantity of life,  
Which bleeds away, even as a form of wax  
Resolveth from his figure 'gainst the fire?  
What in the world should make me now deceive,  
Since I must lose the use of all deceit?  
Why should I then be false, since it is true  
That I must die here and live hence by truth."

The statement made by deceased to his mother, who ran to him immediately that he was shot, might well have been admitted as a part of the *res gestae*. Certainly, under the evidence in this case, it together with the statement to the doctor and the magistrate, who reduced it to writing, was properly admitted as a dying declaration, for the deceased, during all the time from the moment he was shot until he was unconscious, clearly demonstrated that he had abandoned all hope of recovery and realized that he must die. Well might he have entertained such a feeling, for the soft nosed bullet, with which he was shot, had plowed its way through his vitals and left a ghastly, gapping wound, beyond the power of medical skill to heal.

It is next insisted that the court did not properly instruct the jury. There is no merit in this contention. The instructions given cover every possible phase of the



case and presented to the jury, fully and fairly, appellants' defense. Under the instruction, before the jury was authorized to find any one of appellants other than Jerry Rice and Bradley Daniel guilty, it was necessary that it should find from the evidence, beyond a reasonable doubt, first, that a conspiracy had been formed by appellants to kill Wilson Gabbard, second, that in pursuance of said conspiracy, he was killed by one or more of appellants, or some other unknown person or persons, and third, that the others of appellants were acting with them, being then and there present or conveniently near, aiding, assisting, advising, or encouraging them so to do.

While under their plea of not guilty, appellants put in issue every material fact and circumstance necessary to establish their guilt, their real defense was that they did not do the shooting, that they formed no conspiracy, that they entertained a kindly feeling toward deceased, and that, at the time he was killed, they were at another place, at least a mile and a half or two miles distant from the scene of the shooting. If the jury had believed the evidence offered by appellants to establish these facts and accepted their theory and defense as true, under the instructions as given by the court, it would necessarily have been compelled to find the appellants not guilty. If, on the other hand, it accepted the evidence offered by the Commonwealth as true, it was fully justified and supported in its finding, for the Commonwealth showed a state of facts from which the jury was fully warranted in finding all of appellants guilty. In addition to the instructions dealing with all of the appellants, in another appropriate instruction, the court authorized the jury to find Jerry Rice and Bradley Daniel guilty, if they believed from the evidence beyond a reasonable doubt that they, or either of them, fired the shots which killed deceased. Under this instruction, the jury would have been warranted in finding these two guilty, although they may have found that the Commonwealth had failed to make out a case of conspiracy involving the other appellants. The law of the case, as warranted by the charge and the evidence introduced, justified and authorized the court in giving the instructions which he did. They are such as have been frequently approved by this court in cases where the charge of murder, as a result of a conspiracy, was involved.

The only remaining question is, does the evidence support the verdict? A conspiracy is always difficult to

prove. The fact that those contemplating the commission of a crime have banded themselves together for the purpose of committing it is rarely established by direct, positive evidence of such crime, but, in a majority of cases, must be shown by circumstances which, when put together into a composite whole, evidence such a purpose on their part. The evidence in the case before us is of that character.

Ill-feeling is shown to have existed for sometime between certain members of the Rice family and certain members of the Gabbard family. William Rice was engaged in the mercantile business in that locality. A few weeks before the death of Wilson Gabbard, he had set up an opposition business near that of William Rice. A few days thereafter, William Gabbard was shot and wounded by some unknown person. Still a few days later, Ed. Garrett, closely allied with the Rice family, alleges that he had been shot at by some unknown person from ambush. From information gathered by him through detective work performed by female relatives and friends, he conceived the idea that his would-be assassin was a brother-in-law of Wilson Gabbard. This condition of affairs had the effect of creating in that locality a feeling of suppressed excitement, which was intensified on Friday evening before Wilson Gabbard was assassinated, by the discovery on the part of a son-in-law of William Rice of an armed man skulking on the mountain side in close proximity to the homes of William Rice and Dan Rice, his son.

It is testified to for appellants that, immediately upon the making of this discovery, two of appellants were dispatched to the home of Richard Rice, father of William Rice, where he had gone for the alleged purpose of sitting up with his sick mother. They found him there and acquainted him with these facts. It is admitted that each of these messengers was armed, one with a Winchester rifle and the other with a shotgun. What passed between them, further than that they acquainted William Rice with the purpose of their mission, the Commonwealth was unable to show. But, it is admitted by them that, after remaining at the home of Richard Rice until about two o'clock that night, William Rice, his son, Jerry, Bradley Daniel, James Smith and Harvey Sandlin who had joined them, left for the ostensible purpose of going to the home of William Rice. They had gone on horseback to the home of Richard Rice on that even-

ing, but they left their horses there and walked, by a circuitous route, through the woods, over an unfrequented road, stopped on their way at the home of Ansel Vires and had him join them. This they admitted, but alleged that it was for the purpose of going home in order to put in a full days work. They say that they went the unfrequented way in order to avoid any possible contact with would-be assassins. Vires says that he joined them in order that he might go to the store of William Rice to get some meat.

Thus, we have an admission on their part, that they met together at the home of Richard Rice, some miles distant from their home, on the evening of the day before Wilson Gabbard was killed, that they remained there until two o'clock when they left together, and that a part of them at least were armed. They state that they went to the home of Dan Rice and remained there until sometime after the hour when Wilson Gabbard was killed.

According to the evidence for the Commonwealth, however, instead of going to the home of Dan Rice, they went on down the mountain side to a point opposite a field which was planted in corn, in which some, at least, of appellants knew that Wilson Gabbard was to have a corn hoeing on that day, and there concealed themselves until he came out of his house down to the branch preparatory to entering this field, at which point he was fired upon and killed. In his dying declaration, deceased stated that he recognized Jerry Rice and Bradley Daniel as having shot at him and shot him. Another witness for the Commonwealth testifies also that he recognized Jerry Rice and Bradley Daniel as two of the three who fired upon deceased. In addition to this, the Commonwealth showed by two witnesses that, shortly after they heard several shots fired up in the direction of Wilson Gabbard's home, they saw appellants coming down the mountain side from in the direction in which the firing was heard, pass over the creek, and up the hillside beyond, that they recognized each of appellants and that they were armed. The Commonwealth proved by another witness that on the evening before the assassination, Ansel Vires left his home, and that William Rice called at the house of these witnesses and asked if Ansel Vires had returned, and that a short time thereafter William Rice and Ansel Vires passed his house going toward the top of the mountain. Amanda Cornett tes-

tifies that she heard her husband, the evening before the assassination, ask Vires if he was going to William Rice's the next day, to which Vires replied that he was, but did not want anything said about it, for there was no telling what was going to happen the next day. Nancy McIntosh testified that, on the evening before the assassination, she saw appellants, James Smith and William Rice, going along the road, and she concealed herself behind some bushes, that they were talking, and as they passed her she heard William Rice say "there was not aimed to be a Gabbard left."

These statements, when taken in connection with the conduct of appellants in gathering at the home of Richard Rice on the evening that they did, leaving there armed at two o'clock at night, walking by a circuitous route through the woods, going out of their way to the home of appellant, Vires, having him join them, having been seen by two witnesses coming from in the direction of deceased's home shortly after the firing was heard in that direction, were certainly evidence of such gravity as to justify the trial judge in refusing to take the case from the jury.

William Rice testifies that when his son, Jerry, and Bradley Daniel notified him that an armed man had been seen skulking through the bushes near his home, he discussed the matter with his father, and his father became alarmed for his own safety. While he testifies that there was no discussion as to the probable identity of this man, their conduct when read in connection with the evidence to the effect that Ed. Garrett, his business associate, believed that an attempt had been made by Wilson Gabbard's brother-in-law to assassinate him one or two days before, and the further evidence that he was heard to say to his brother-in-law, Smith, on the evening before, "that there was not aimed to be a Gabbard left," justifies the belief that when they left Richard Rice's house on that night, a plan of action had been agreed upon, and this idea is accentuated when the evidence of what Ansel Vires is alleged to have said to the husband of Amanda Cornett on the evening of the assassination is considered. If this evidence and the evidence for the Commonwealth to the effect that they were seen coming from in the direction of Wilson Gabbard's a short time after the shooting is to be believed, the jury was fully warranted in returning the verdict which it did.

While each of appellants insists that he entertained no unfriendly feeling toward the deceased, no one of them went near him or to his home to inquire about him after they learned that he was shot, or did or said anything that could be construed into a manifestation or expression of surprise or regret on their part that he was shot.

Much evidence was introduced by both the Commonwealth and in behalf of the accused that the reputation of several of the witnesses, who testified in this case, for truth and veracity was not good, but, when the evidence is considered in its entirety, we are constrained to hold that it is sufficient to support the verdict. While there are some contradictions and many circumstances brought out in the evidence, which are not made clear and are not easily understood, still one cannot read this record without being impressed with the idea that appellants deliberately planned the assassination of Wilson Gabbard and carried it into execution.

We find no error in the record prejudicial to appellants' substantial rights, and the judgment is, therefore, affirmed.

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### Smith v. Commonwealth.

(Decided June 20, 1913).

#### Appeal from Clark Circuit Court.

1. Criminal Law—Appeal—Indictment—Hearing of Other Than Legal Evidence by Grand Jury—Action of Trial Court in Refusing to Set Aside Indictment—Review—Section 281, Criminal Code.—Under section 281, Criminal Code, the action of the trial court in refusing to set aside an indictment on the ground that the grand jury heard other than legal evidence is not subject to exception, and cannot be reviewed on appeal.
2. Criminal Law—Witness—Impeachment—Collateral Issue.—Where on the trial of the defendant for knowingly, feloniously and corruptly swearing that two alleged participants in a murder were in the town of Jackson, 20 miles away from the scene of the murder, a witness for the Commonwealth testifies that the two men were present with him participating in the crime and also a third man, the whereabouts of the third man who participated in the crime was so much a part of the *res gestae* as to make it a direct and material issue instead of a collateral issue, and the defendant is not concluded by the answer of the Commonwealth's witness, but may show by other witnesses that the third party was

as a matter of fact, not present at the scene of the crime, for the purpose of impeaching the Commonwealth's witness.

3. Criminal Law—Witness—Interrogation by Court.—Although the trial court may interrogate a witness for the purpose of ascertaining the truth and bringing before the jury the real facts of the case, where there is nothing in the question or the manner of the interrogation from which the court's opinion of the facts or the weight of the evidence can be gathered, yet it is prejudicial error for the court to examine the witness in reference to a conversation he had with the court in such a manner as to make the court itself an impeaching witness.
4. Criminal Law—Evidence—Rebuttal.—The trial court has a reasonable discretion in admitting testimony in chief by rebuttal witnesses, and it is only in rare instances that a reversal will be decreed because of the court's action in receiving evidence in rebuttal which should have been adduced in chief.

BEVERLY R. JOUETT, J. SMITH HAYS, J. SMITH HAYS, JR.,  
W. B. LINDSEY, H. H. MOORE and T. P. COPE for appellant.

JAMES GARNETT, Attorney General, and CHAS. H. MORRIS, Assistant Attorney General for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

On May 4, 1912, Ed Callahan, former sheriff of Breathitt county, was assassinated while standing at the window of his store house at Crockettville, a small town about twenty miles from Jackson. The shots which killed him were fired from a woodland on the side of a mountain about 157 yards distant. At the September term of the Breathitt Circuit Court, the grand jury of that county returned indictments against D. F. Deaton, Doc Smith, Andrew Johnson and several others charging them with the commission of the crime. On motion of the Commonwealth, a change of venue was granted, and the cases were transferred in October, 1912, to the Clark Circuit Court. The defendants made a motion for bail. The trial of this motion consumed several days. On the completion of the trial, D. F. Deaton, Govan Smith and several others were admitted to bail. Five of the defendants, to-wit: John Claire, Andrew Johnson, Doc Smith, Asbury McIntosh and Jim Deaton were held without bail. D. F. Deaton was the first defendant to be tried. His trial was begun on December 30, 1912, and resulted in a hung jury. Immediately thereafter Doc Smith and Andrew Johnson were jointly tried. Their trial also resulted in a hung jury. On the trial of

D. F. Deaton, the main issue was whether Deaton, Doc Smith and Andrew Johnson, who, it is claimed, were acting in concert with him in the murder of Callahan, were in Jackson on May 4, 1912, at the time of the murder, or in Crockettville. On that trial M. C. Smith was a witness, and testified that he was in Jackson on the morning of May 4, 1912, and that he saw Doc Smith and Andrew Johnson at about the time the crime was said to have been committed. Several others testified to the same effect. Immediately after the trial of Andrew Johnson and Doc Smith, and on January 18, 1913, the grand jury of Clark County indicted M. C. Smith and about eleven others for the crime of false swearing. The indictment returned against M. C. Smith charges in substance that said Smith, on the 17th day of January, 1913, in the county of Clark, and before the finding of the indictment, after having been sworn by J. M. Benton, judge of the Clark Circuit Court, who was duly authorized by law to administer an oath to testify to the truth, on the trial of the case of the Commonwealth of Kentucky v. D. F. Deaton, on the charge of murder in the Clark Circuit Court, a case then judicially pending in said court, did unlawfully, willfully and feloniously, knowingly and corruptly testify that on May 4, 1912, the day on which Ed Callahan was shot at his store on Longs Creek, in Breathitt County, Kentucky, Doc Smith and Andrew Johnson were in the town of Jackson, Breathitt County, Kentucky, and that he saw them in said town of Jackson on that day, when, in truth and in fact, the said Doc Smith and Andrew Johnson, or either of them, were not in said town of Jackson on the 4th day of May, 1912, and when the said Smith knew he had not seen them or either of them in said town of Jackson, and knew said statements were false and untrue at the time he made said statements. On the back of the indictment are the names of the following witnesses: M. Crain, Jim Little, Adam Stacy, Mrs. Lillian Gross, Mrs. Callahan, Herd McIntosh, Mrs. Anderson, Miss Maxey Samdlin. On January 27, 1913, a special term of the court was called, and convened on March 31, 1913, for the trial of the indictment against defendant, M. C. Smith.

On the calling of the case for trial on April 1st, 1913, defendant filed a motion to set aside and quash the indictment, and also filed his affidavit in support of said motion. The affidavit alleges in substance that the in-

dictment was not found as required by the Code, and that the grand jury had not received such legal evidence as is contemplated by section 107, of the Criminal Code; that the witnesses whose names are on the indictment did not go before the grand jury, and that their alleged testimony, or extracts and memoranda from it, as taken by the official stenographer on the trial of D. F. Deaton or Andrew Johnson and Doc Smith, were read to the grand jury. On this motion the court heard evidence. Mr. Letton, a member of the grand jury returned the indictment, testified that no ladies appeared before the grand jury. He did not remember whether Herd McIntosh testified or not. Was under the impression that Mick Crain was there. The court declined to permit witness to testify whether or not Mick Crain gave any evidence as to the whereabouts of Andrew Johnson and Doc Smith on the day Ed Callahan was killed. Witness was under the impression that a Mr. Little was there. The same question was asked him in regard to the evidence of this witness, but the court declined to hear the evidence. Witness did not recall whether Adam Stacy was there or not; did not recall that Jas. Dixon or Geo. Moore was before the grand jury, and did not think that W. H. Blanton or Charles Maupin or Geo. Durbin or Harve Burns or A. H. Patton or Clay Aldridge or James Young or Patton Ashburn were before the grand jury. Witness also testified that it was his impression that only the transcript of the evidence in the case of Commonwealth v. Fletcher Deaton, or in the case of Commonwealth v. Doc Smith and Andrew Johnson, was presented to the grand jury. Did not remember whether it was read or not. There were several records in there.

Mr. Hodgkins, another member of the grand jury, in answer to the question "How did you get the evidence of Mrs. Callahan and Mrs. Gross and those people," answered "Well, think Mr. Crutcher or Mr. Davis recited about how they testified." He further stated that he remembered Mr. George Moore and Mr. Sam Moore testifying in the case. They told about the testimony of certain other witnesses. On cross-examination Mr. Byrd asked the following question:

"Q. You were advised by the attorneys representing the Commonwealth that, in their judgment, the testimony was sufficient to authorize indictment in this case,



and the other cases in which you did return the indictments for false swearing?

"A. Yes, sir."

After hearing the above evidence, the motion to quash and set aside the indictment was overruled. Thereafter each of the witnesses for the Commonwealth was asked the question whether or not he appeared before the grand jury, but on objection by the Commonwealth, the court declined to permit them to answer. In each instance the defendant avowed that the witness would state that he had not been before the grand jury.

Before going into trial the defendant filed an affidavit for continuance, based on the absence of certain witnesses for whom he claimed subpoenas had been issued and placed in the hands of the clerks three days before. The court refused a continuance, and would not permit the affidavit to be read as the testimony of the absent witnesses, except in the case of Jim Little.

The trial then proceeded. For the Commonwealth Judge Benton testified that defendant, M. C. Smith, appeared as a witness and was sworn by him on the trial of the case of Commonwealth v. Deaton. The official stenographer who reported the case of Commonwealth v. Deaton, testified that the defendant stated in substance on that trial that he saw Doc Smith and Andrew Johnson, or a man that was introduced to him or that was called Andrew Johnson, in the town of Jackson at or near Govan Smith's store or place of business on Saturday, May 4, 1912, the day Ed Callahan was said to have been shot. Asbury McIntosh, Mrs. Lillian Gross and Herd McIntosh, who were present at the time Ed Callahan was killed, all swear that they saw Smith and Andrew Johnson, at the time Ed Callahan was shot, on the side of the hill near Ed Callahan's house, about 125 or 150 yards distant. Doc Smith, one of the men indicted for the murder of Ed Callahan, testified that he and Andrew Johnson were together near Callahan's house on the morning of May 4, 1912, and that neither one of them was in Jackson during that day. On cross examination he stated that the other two men who were with him were Jim Deaton and David Deaton. They were all present when Ed Callahan was killed, and were firing at him. They went down there to lay Ed Callahan away. While there he thinks Jim and Andrew put up some forks—stuck them in the ground. He didn't pay any attention to them as he didn't need any. Near the con-

clusion of this, witness' testimony, the court took up the examination as follows:

"The Court: Do you know this defendant, M. C. Smith sitting over here?

"A. Yes, sir.

"Q. How long have you known him?

"A. I have known him a long time, eight or ten years.

"Q. Did you see him or have any talk with him that day, May 4, 1912, the day Ed Callahan was shot?

"A. No, sir."

The defendant's objection to the court's examination of the witness was overruled, and an exception saved. The Commonwealth then closed its evidence in chief.

The defendant testified that he lived about two miles from Jackson. Knew Ed Callahan well, and was a friend of his. He was in Jackson Saturday, May 4, 1912. He approached Jackson from the south side in company with Old Man Andy Hays. They crossed the bridge some time after nine o'clock. When they got to north Jackson they heard that Ed Callahan had been shot. He saw Govan and Doc Smith and Andrew Johnson immediately after the shooting. He knew Doc Smith, but did not know Andrew. Andrew was introduced to him by Doc or Govan Smith. He stayed there until three o'clock. He testified on the trials of Commonwealth v. D. F. Deaton and Commonwealth v. Doc Smith and Andrew Johnson, and testified to the same facts that he testified to in this case. Andy Hays testified that he was in Jackson on the morning of May 4, 1912, the day Ed Callahan was shot. M. C. Smith went with him. When they went over to Jackson he saw Doc Smith and Andrew Johnson and Govan Smith made him acquainted with them. He went to Jackson to make out his pension claim, and to pay Dr. Arnold's doctor's bill amounting to \$2.50. On cross-examination, witness stated that he told several people that he might have been mistaken. After witness had been cross-examined by counsel for the Commonwealth, the court took up the examination as follows:

"Q. The Court: I want to ask you this question: Do you remember meeting me on the street yesterday and you stopping me and shaking hands with me?

"A. Yes, sir.

"Q. The Court: Didn't you tell me without my asking you anything that you were mistaken in your testimony down here before?

"A. I said I thought I must have been mistaken.

"Q. The Court: That you came down here and swore that you saw them in Jackson May 4th, but that you were mistaken, and if you were mistaken about it you were honestly mistaken about it.

"A. Yes, sir, but I was talking then and swearing now."

Defendant's objection to the court's interrogating the witness was overruled, and exceptions saved.

In addition to the foregoing witnesses, Breck Flinchem, Oscar Hagins, Bud Little, James Haddix and others testified that they saw Doc Smith and Andrew Johnson in Jackson on the morning of the day Callahan was shot. It was also shown that Asbury McIntosh, on his examining trial, testified that he knew nothing about the killing and did not know who did it. Afterwards he became a witness for the Commonwealth and testified that he recognized Andrew Johnson and Doc Smith as the parties who did the shooting. After giving this statement he stated to the jailer of Clark county that he did not see Doc Smith and Andrew Johnson the day of the shooting. It was further shown that Mrs. Gross and Mrs. Callahan stated to different parties after the killing that they did not know who did it, and that they immediately telephoned for bloodhounds. There was also evidence to the effect that owing to the distance from the parties who fired the shot, and to the fact that they were concealed in the woodland, it was impossible at the Callahan house to identify them. It was also shown that on the first trial of D. F. Deaton, Govan Smith testified that Andrew Johnson and Doc Smith were in Jackson on May 4th. On the trial of Doc Smith and Andrew Johnson, both Govan and Doc Smith testified to the same effect. In rebuttal several witnesses for the Commonwealth contradicted various statements made by the witnesses for the defendant. There was also evidence received that should more properly have been admitted in chief.

(1) It is insisted that the court erred in refusing to set aside the indictment on the ground that it was returned in violation of section 107 of the Code, which provides in part that "The grand jury can receive none but legal evidence." Section 281 of the Criminal Code,

as amended by the Acts of 1910, provides: "The decisions of the court upon challenges to the panel and for cause and upon motion to set aside an indictment shall not be subject to exceptions." In the recent case of *Slaughter v. Commonwealth*, 152 Ky., 128, a reversal was asked because of the error of the trial court in not setting aside the indictment on the ground that the names of the witnesses who appeared before the grand jury were not endorsed on the indictment as required by section 120 of the Criminal Code. After quoting the above section of the Criminal Code, the court said:

"In the recent case of *Hendrickson v. Commonwealth*, 146 Ky., 742, this court, after a review of all the cases bearing on the question, announced the rule that although an indictment fails to contain an endorsement of the names of the witnesses examined by the grand jury, this infirmity may be corrected by motion to quash or set aside the indictment upon arraignment of the prisoner as required by Section 157, Criminal Code, nevertheless, under Section 281 of the Criminal Code, a decision of the court upon a motion to set aside an indictment is not subject to exception and cannot be reviewed on appeal."

Section 281 of the Criminal Code, *supra*, is equally applicable in a case of this kind, and precludes us from reviewing the propriety of the court's action in refusing to set aside the indictment in question.

(2.) It is next insisted that the court erred in either refusing to grant a continuance or in refusing to permit defendant's affidavit to be read as the depositions of certain absent witnesses. As to certain of these witnesses the trial court found as a matter of fact that no subpoena had been issued for them, and there is nothing in the record to show that he erred in this finding. The affidavit alleged that both Mrs. James Bowling and Mrs. James Stidham, if present, would testify that they saw James Deaton in Fletcher Deaton's yard between nine and ten o'clock on the morning of May 4, 1912. The defendant also offered to prove this fact by other witnesses. The court excluded the evidence of the whereabouts of Jim Deaton on the idea that his presence with Doc Smith at the time the shooting took place was brought out on the cross examination by counsel for defendant, and being a collateral matter, defendant was concluded by his answer. Certain witnesses for the Commonwealth had stated that there were three men

present when the shooting took place. The witness Doc Smith was asked who the third man was. He replied that it was Jim Deaton. If Doc Smith's testimony be true, Jim Deaton was present with him and Andrew Johnson, and actually participated in the murder of Ed Callahan. It being contended that he was an actor in the tragedy, a participant in the crime, his whereabouts on that occasion were so much a part of the *res gestae* as to make them a material and relevant issue instead of a collateral issue. We, therefore, conclude that defendant was not bound by Doc Smith's answer that Jim Deaton was present when the crime was committed. The issue in the case being one of veracity between Doc Smith and the defendant as to whether Doc Smith and Andrew Johnson were in Jackson on May 4th, it was competent for the defendant to show not only that Doc Smith and Andrew Johnson were not at Ed Callahan's on that day, but were in Jackson, and also that Jim Deaton, who Smith claims was present with them at Callahan's, was also in Jackson on that day. In other words, it was competent to show that he testified falsely as to the whereabouts of any one of the alleged members of the conspiracy. We, therefore, conclude that the court erred in refusing to let the evidence in question go to the jury.

(3.) It is also urged that the court erred in interrogating the witnesses Doc Smith and Andy Hays in the manner hereinbefore set out. We see nothing in the examination of Doc Smith of which complaint may properly be made. Smith had testified to facts which, if true, made it impossible for the defendant to have seen him in Jackson on May 4, 1912. No one, however, had asked Smith the direct question whether or not he saw defendant in Jackson on that day. Thereupon the court asked the question. The question was the result of an effort to ascertain the truth, and to bring before the jury the real facts of the case, and there was nothing in the question or the form in which it was put from which could be gathered the court's opinion of the facts or of the weight or sufficiency of the evidence. )

As to the examination by the court of the witness, Andy Hays, a different question is presented. It will be observed that by the examination hereinbefore set out, the court called on the witness to testify as to a conversation which the witness had had with the court the day before. There can be no doubt that the first

question asked by the court plainly indicated to the jury that the witness had had a conversation with the court the day before in which he stated that he was mistaken in his testimony. When the witness answered "I said I thought I must have been mistaken," the court was not satisfied with his answer. He went on, and for the purpose of bringing before the jury what the witness had really stated to him, asked the additional question "That you came down here and swore that you saw them in Jackson May 4th, but that you were mistaken and if you were mistaken about it you were honestly mistaken about it?" The effect of repeating this question was to bring before the jury exactly what the witness did say to the court, and to indicate to the jury what the court thought of his testimony. The trial court, in discussing this phase of the case in a written opinion overruling the motion for a new trial, used the following language:

"The situation presented was not free of embarrassment for the Judge. Three courses were open to him. When the witness Hays had testified as he did, one was to play the part of the figure head and the silent witness of a farce, another was to call the counsel on both sides to the bench and impart his information to them and leave it to counsel for the Commonwealth to propound the question to the witness, the other was for the judge himself to ask the questions. If the counsel had been called to the bench, or even taken to another room for such a purpose or such a conference, and the counsel for the Commonwealth had then propounded the questions to the witness it would have been perfectly obvious to the jury that the information upon which the questions were based, had been furnished by the judge. The other course, the other one adopted by the judge, gave less prominence to this Hays episode than such a parade would necessarily have done, and some such consideration must have influenced the judge to adopt the course he did in propounding the questions himself instead of calling the attention of the counsel to what the witness Hays had voluntarily stated to him, and having them ask the witness the questions.

"The fact was one the jury was entitled to hear and consider and it cannot be said that the action of the judge was improper, prejudicial or illegal."

The court also quoted the following from the case of *State v. Anderson*, (S. C.) 137 Am. St. Rep., 887:

"A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course he should do so in a fair and impartial manner, and should not by the form or manner of his questions, express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence."

We fully realize the fact that the situation of the trial judge was embarrassing, and perhaps we might have made the same mistake that he did. On reflection, however, it seems to us that the proper practice would have been for the court, at the next adjournment, to call the attention of counsel to the conversation which he had had with the witness. As it was Hays was one of defendant's principal witnesses—the very man he claims to have gone into Jackson with, and who was present with him at the time that he claims to have seen Smith and Johnson in Jackson. His testimony, therefore, was of the greatest importance. We think the authority cited by the trial court is a very clear statement of the duties of a trial judge. We accept that statement as a fair exposition of the law on the subject, but it seems to us that the questions propounded to the witness Hays and the manner of his examination, though doubtless not so intended, go beyond the limitations pointed out in that opinion. The necessary effect of the questions propounded was to place the court itself in the attitude of an impeaching witness. We, therefore conclude that this action on the part of the court was prejudicial to the substantial rights of the defendant.

(4.) It is next insisted that the court erred in receiving evidence in rebuttal which should have been adduced in chief. Doubtless there are a few instances where this occurred, but in view of the fact that the trial court has a reasonable discretion in admitting testimony in chief by rebuttal witnesses, it is only in very rare instances that a reversal will be decreed on this ground. *Henson v. Commonwealth*, 139 Ky., 173; *Truax*

v. Commonwealth, 149 Ky., 703. But on another trial the State will introduce in chief all its evidence in chief.

For the reasons indicated, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

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### **Von Cotzhausen v. Barker.**

(Decided June 20, 1913).

#### **Appeal from Carroll Circuit Court.**

1. **Contract—Animals—Keep.**—In an action to recover on a contract for the keep of stock, where defendant claimed that the stock was to be kept on shares, evidence examined and held to sustain the finding of the chancellor in favor of plaintiff.
2. **Pleading—Consolidated Actions—Defect in Pleading Supplied By Others.**—Where several causes of action between the same parties are consolidated, allegations defectively stated in or totally omitted from one of the pleadings may be supplied by the averments contained in another, and a defect in the pleadings will be held to exist only where, considering them as a whole, a material averment is found to be omitted.
3. **Parties—Corporations—Evasion of Corporation Laws.**—Where a corporation, for the purpose of evading the corporation laws of this state, turns over to its president certain livestock, with power to make contracts with reference thereto, neither the corporation nor the president can complain of the fact that the corporation is not made a party to action against the president to recover for their keep, where the latter did not ask that the corporation be made a party.
4. **Principal and Agent—Personal Judgment Against Agent—When Allowed.**—Where a corporation, for the purpose of evading the corporation laws of this state, turns over to its president certain livestock, with authority to make contracts with reference thereto, and he, in his individual capacity, contracts for their keep, he thereby becomes personally liable on the contract.
5. **Animals—Agister's Lien—Livestock—Contract for Keep—Time for Payment Not Fixed.**—Where the contract for the keep of livestock is terminable at the will of either party, and no time for payment is fixed, it cannot be said that the keep is due at any particular time, and a keeper who still has the stock in his possession, is entitled to a lien and to retain the stock until his claim is paid, although claim covers a period of more than six months.
6. **Parties—Appearance.**—One who files a demurrer to a petition and has an order entered controverting of record the allegations of the petition, enters his appearance.



7. Action—Several Causes — Consolidation — Submission. — Where plaintiff brings several successive actions for the keep of stock, and it is admitted that he kept the stock during the time covered by the fourth petition, it is not error to consolidate that case with the others, and submit it for judgment, where the only issue between the parties is whether or not the stock were to be kept on the shares or as boarders, and it appears that several hundred pages of proof has been taken on this question and no claim is made by the defendant that he had any additional proof which he could have taken but was not given an opportunity to do so.

McQUOWN & BECKHAM and ARTHUR W. COX for appellant.

A. C. VAN WINKLE for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Plaintiff, R. M. Barker, brought four suits against the defendant, Alfred Von Cotzhausen, to recover certain amounts alleged to be due for the keep of four stallions, thirteen mares and four yearling colts. In the first suit judgment was sought for keep of said stock from April 17, 1909, to November 10, 1910, in the sum of \$1,045.50, subject to a credit of \$402.50. In the second suit judgment was sought for \$200 for keep of a portion of said stock from November 10, 1910, to December 12, 1910. By the third suit judgment was sought for \$417.50 for keep of a portion of said stock from December 12, 1910, to February 12, 1911. By the fourth suit judgment was sought for \$598.91 for keep of a portion of said stock from February 12, 1911, to August 25, 1911. In each of these suits a lien was asserted on said stock for the amount of their keep under Section 2500, Kentucky Statutes. Demurrers were filed to each of the petitions and overruled. The material averments of the first three named petitions were controverted by answers. After the demurrer to the fourth petition was overruled, the affirmative allegations thereof were controverted of record. The cases were all consolidated and on final hearing plaintiff was given a judgment against defendant for the sum of \$1,849.91, with interest, and adjudged a lien on the stock, which the commissioner was directed to sell. From the judgment so entered the defendant appeals.

Briefly stated, the facts are as follows:

In April, 1908, plaintiff was engaged in farming in Carroll County, Kentucky. The farm belonged to his mother. Defendant was president and general manager of the Progress Blue Ribbon Farm, a Wisconsin corporation. A meeting between plaintiff and defendant took place at Milwaukee. At that time certain contracts were drawn up between defendant and the Richlawn Stock Farm, stated in the contracts to be a co-partnership composed of V. A. Barker, W. E. Fisher and plaintiff. These contracts are of great length and provide for the keeping on shares of stock to be sent by Von Cotzhausen to the Richlawn Stock Farm. There was also a contract by which it was proposed to organize a corporation which should acquire the Richlawn Stock Farm, and the Blue Ribbon Farm should furnish it stallions and mares for breeding purposes. Plaintiff was to be the general manager of the new corporation. Farms and agencies for the sale of the stock thus bought were to be established at Lexington, Memphis and other points. When plaintiff returned home, his mother, Mrs. Barker, and W. E. Fisher, his brother-in-law, declined to ratify the contracts. Plaintiff advised Von Cotzhausen of this fact. In this letter he asked if he could not make some personal deal with defendant. On April 28, 1908, defendant answered plaintiff's letter, and expressed his regret that the negotiations could not be carried out. In April, 1909, defendant came to Lexington. He telegraphed plaintiff that he had directed a car of horses sent to Madison, Indiana, and wished plaintiff to call there for same. Plaintiff claims that he advised defendant that he could not in any event take any more than four of the horses on the shares, and he would only take these provided, on inspection, they appeared to be the kind that he could use. Plaintiff says that when he went to Madison to inspect the horses he found them in wretched condition, although a letter written about that time to defendant would seem to indicate the contrary. Thereupon plaintiff at once telephoned defendant that he would not take the horses except as boarders. Defendant requested plaintiff to come to Cincinnati and go over the situation with him. He then told defendant the terms upon which he would keep the stock for the time being. Defendant acceded to these terms, although he stated at the time that the stock would be removed from the farm within a short period of time. Thereafter plaintiff repeatedly asked for shipping directions for these horses. On April 23, 1909, de-

defendant wrote plaintiff that he understood that the colts of that year belonged entirely to him free of cost. He claims in this letter that the confusion relative to the shipment was due in whole or in part to defendant's failure to advise him that he would not accept the stock on shares. Thereupon plaintiff wrote defendant that he did not agree to take the stock on shares, and would not keep them on such terms. He then states the terms upon which he was willing to allow the stock to remain on his place, and informs defendant that if he does not wish the stock to remain there, to indicate where he desires the stock shipped. On May 18, 1909, defendant wrote plaintiff that he recalled the conversation they had at Cincinnati, and that while under the present arrangement he was bearing the burden of the keep of the horses, he would try to forget the unpleasant features of the matter and continue his friendly feeling for plaintiff. In this letter he enclosed a check amounting to \$104 for the keep of the horses and the expense in connection with them. On May 26, 1909, defendant wrote that he understood that the colts for the present year were to belong to him free of cost. In all of his letters, however, he is still insisting that plaintiff handle the horses on shares or in some way or other. On June 27, 1909, plaintiff again informs defendant that he does not desire to keep the horses on shares. He further tells him that he is ready to ship the horses away unless the terms were satisfactory to defendant, and asks for shipping directions. On July 27, 1909, defendant paid plaintiff \$83.95 in part settlement for the board bill of these horses. On November 8, 1909, defendant sent an additional check for the keep of the horses up to November 3rd, amounting to \$112.

Defendant, in his testimony, explains the negotiations leading up to the contracts of April, 1908. He says that Barker represented himself as having authority to enter into these contracts. Thereupon the contracts were signed and delivered. He claims that while nothing was done under the lease contracts at the time, he and Barker frequently corresponded with reference thereto. He picked the horses, and Barker prepared for them, and when the horses were finally sent to Barker, they were sent under the terms of the contracts of April, 1908. Defendant further says that not knowing what the provisions of the corporation laws of Kentucky were, he signed the proposed contract on behalf of the Progress Blue Ribbon Farm so that the corpora-

tion would not render itself liable to the Kentucky corporation laws. This fact was well known to Barker. He further claims that when he sent the consignment of horses to Barker he distinctly understood that the horses were consigned under and by virtue of the provisions of the contract of April, 1908, and upon no other terms. He further claims that it was not until Barker actually got possession of the stock that the latter claimed that the stock was at his place upon any other terms. He claims that the sums paid for the keep of the stock were advanced to Barker as a matter of accommodation because Barker had no money. He further claims that Barker knew that the stock belonged to the Progress Blue Ribbon Farm; that the bills were made out against it and actually paid by it. He produces many letters showing that he constantly brought to the attention of Barker the fact that the stock was kept under the original contract, and that Barker was not to charge anything for their keep, but was to take care of the stock on shares.

It will be seen that the evidence as to the terms on which the stock were kept by plaintiff is very conflicting. Plaintiff testifies one way while defendant testifies the other. Notwithstanding their various contentions, the following facts clearly appear: Immediately after receiving the stock plaintiff notified the defendant that he would not accept them on shares. He further stated that if defendant did not like that arrangement to give him shipping directions. No shipping directions were ever given. Thereafter defendant's letters not only show that he knew the stock were being kept as boarders, but knew the rates at which they were being kept. Furthermore, he actually sent plaintiff several checks in payment for their keep. In view of these facts, we see no reason to disturb the finding of the chancellor in favor of plaintiff.

It is insisted that the statute gives a lien only in the event that the contract for the keep of the stock is made with the owner, and that the petitions in two of the cases do not allege that the defendant was the owner of the stock. It appears, however, that the petitions in the other two cases do allege such ownership. As the several causes of action are between the same parties, and were consolidated, the petitions should be read together and considered as one. The allegations defectively stated or totally omitted in one pleading are supplied by

the averments contained in another, and a defect in the pleadings will be held to exist only when, considering them as a whole, a material averment is found to be omitted. *Pioneer Fuel Co. v. St. Peter Street Imp. Co.*, 64 Minn., 386; *Castro v. Whitlock*, 15 Tex., 437.

It is further insisted that although the pleadings, taken as a whole, allege ownership by defendant, yet the proof utterly fails to show that the defendant was the owner of the stock in question, but does show that the Progress Blue Ribbon Farm, a corporation, owned the stock. It is therefore insisted that it was error not only to adjudge plaintiff a lien on the stock without making the Progress Blue Ribbon Farm a party, but also to render a personal judgment against defendant. Defendant himself states, however, that the stock was turned over to him to make contracts with reference thereto for the purpose of evading the corporation laws of Kentucky. Having, for the purpose of evading the corporation laws of Kentucky, put the stock in defendant's charge, with full power to make contracts with reference thereto, and having vested him with the apparent ownership of the stock, neither the defendant nor the corporation will be heard to say that any of the corporation's rights were prejudiced by the failure of the court to make the corporation a party, when the defendant did not ask that this be done. And having made the contracts in his own name in order that the corporation of which he was the president might not subject itself to any liability under the corporation laws of Kentucky, and credit having been extended to him in his individual capacity, he thereby rendered himself personally liable on the contract.

But it is insisted that the agister's lien given by Section 2500, Kentucky Statutes, is subject to the laws and restrictions provided in the case of a landlord's lien for rent, and that plaintiff has been given a lien for keep that was due for a longer time than provided by the statutes in the case of a landlord's lien. In interpreting the landlord lien statutes it has been held that as between a landlord and other lien-holders the landlord cannot assert his lien for rent that has been due more than ninety days. As between the landlord and creditors not lien-holders, he cannot assert his lien for rent that has been due for more than 120 days. As between the landlord and the tenant, however, the landlord cannot assert his lien for rent that has been due for more

than six months. *Petrie, &c. v. Randolph, &c.*, 85 Ky., 351. In the case under consideration, however, the contract for the keep of the stock was at will. While the stock were to be paid for at a certain rate per month no time for payment was fixed. That being true, it cannot be said that the keep was due at any particular time, or that plaintiff was given a lien for keep that had been due for more than six months. The stock still being in the possession of plaintiff, he had the right to retain the stock until his bill for keep was paid. *Sheth v. Brangman*, 27 Ky. L. R., 395.

There is no merit in defendant's contention that he was not before the court in the fourth suit that was filed, and that the court erred to his prejudice in consolidating that suit with the others, and submitting the case for judgment. The record shows that he entered his appearance to the fourth suit not only by filing a demurrer thereto, but by having the allegations of the petition controverted of record. It is admitted that plaintiff kept the stock for the time set forth in the fourth petition. The only real issue between the parties was whether they were kept on shares or as boarders. Several hundred pages of proof were taken on this question, and it is not seriously contended that defendant had any additional proof which he could have taken, but was not given an opportunity to take.

Judgment affirmed.

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### **Barrickman v. Lyman, City Engineer, et al.**

(Decided June 20, 1913).

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Fourth Division).

**Mandamus—Public Records—Inspection.**—A citizen and taxpayer of a city of the first class, having an interest in the records of the city engineer's office, has a right to inspect them under reasonable terms and conditions, and where he is refused this right mandamus will lie, even though the inspection is desired for purposes of a pending suit against the city.

ELMER C. UNDERWOOD for appellant.

WILLIAM J. O'CONNOR and PENDLETON BECKLEY for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Plaintiff, Nellie Barrickman, brought this action against defendants, David R. Lyman, city engineer of the city of Louisville, and the city of Louisville, for a mandamus compelling them to permit her attorney, Elmer C. Underwood to investigate and inspect certain records on file in the office of the city engineer. A demurrer was sustained to the petition, and the writ of mandamus denied. Plaintiff appeals.

The petition is as follows:

"Plaintiff says:

"That she now is and at all the times herein stated was a resident of and taxpayer in the city of Louisville. That on or about June 27, 1912, she was injured by falling over a barricade or obstruction placed in Dumesnil street in the city of Louisville at or near Twenty-first street. That at said time Dumesnil street was a public street and highway of the city of Louisville. That she is informed and believes that said obstruction was placed in the said public street by the defendant, city of Louisville, and that said city negligently failed to maintain a proper warning of the existence of said obstruction, and by reason of the negligence of said city the plaintiff fell over said obstruction and injured herself, and she has now pending suit No. 73540 in the Jefferson Circuit Court, Common Pleas Branch, Fourth Division, for the recovery of damages caused by the injuries sustained by her at said time. That in preparing her case for trial it became necessary for her to have the records of the city engineer's office investigated so that she might determine whether or not the city of Louisville placed said obstruction in said street, as she is informed, when said obstruction was placed there, the officers or agents of the city of Louisville who placed said obstruction there, and the officers or agents of the city of Louisville who had charge of said obstruction. That with a view of ascertaining said facts, she authorized one of her attorneys, Elmer C. Underwood, to make an investigation of the records of said city engineer's office for said purpose. That the city engineer is the custodian of said records and has in his office as city engineer the records showing whether or not said obstruction was placed in said street by the city of Louisville, and whether or not said street was being repaired at said time by the city of Louisville, and the names of the officers or servants of

the city of Louisville in charge of said repairs and charged with the guarding of said obstruction. That said Underwood accordingly, on February 27, duly applied to David R. Lyman, city engineer of the city of Louisville and defendant herein, for permission to inspect said records for the aforesaid purpose. Said Lyman was then and is now the duly appointed, qualified, and acting city engineer of the city of Louisville, and has said records under his control and in his possession. That said Lyman refused to allow said Underwood to make any investigation whatever of said records. That the investigation of said records by her attorney is necessary to her in the preparation of her aforesaid suit for trial, and necessary for the ascertaining of the truth in regard to the condition of said street at said time, and that unless she is allowed to make said investigation through her attorneys, she cannot properly prepare her case for trial.

“WHEREFORE, plaintiff prays that this court, by its order of mandamus, compel and require the defendant, David R. Lyman, as city engineer of the city of Louisville, and the city of Louisville to permit the plaintiff by her attorneys to investigate the records in the city engineer’s office to ascertain whether or not said Barricade was in fact maintained by the city of Louisville, when it was erected, and the officers and agents in charge of said barricade and in charge of the repairs of said street, referred to in the body of the petition, and she further prays for all other proper relief.”

Section 2775, Kentucky Statutes, provides that “all official papers, proceedings, and records of the former officers and general councils and trustees, and of the present and succeeding officers, general councils, and trustees of the city, under previous charters and under this and succeeding acts, are hereby declared public records, and as such shall be preserved and be entitled to all faith and credit of public records.” \* \* \* The language of this section is not confined to the officers of the general council. By its very terms it includes all the former, present and succeeding officers of the city. The board of public works is required to keep a “continuous index, record or minute” of all official business transacted by the board. Kentucky Statutes, section 2804. The same board is given the exclusive control over the construction, re-construction, cleaning, repairing, platting, grading, improving, etc., of all the streets, alleys,



avenues, etc., of the city of Louisville. Kentucky Statutes, section 2825. The board is expressly required to prepare and place on file estimates of all work done, whether done by the employees of the board or by independent contract. Kentucky Statutes, sections 2828, 2829. The city engineer is an officer of the city of Louisville, and is under the control of the board of public works. Kentucky Statutes, section 2810. From the foregoing sections it cannot be doubted that the city engineer is a public officer of the city of Louisville, and that the records of his office are public records. The question presented is: Will a writ of mandamus lie to compel the city engineer and the city to permit an inspection of the public records of his office by one who is not only a citizen, but who has a special interest in the records? The court below took the view that a mandamus will not lie, because a subpoena *duces tecum* would furnish plaintiff adequate relief, and for the further reason that an inspection of the records was desired by plaintiff for the purpose of preparing her suit against the city. Suppose a taxpayer sought to enjoin the collection of certain taxes on the ground of their invalidity, and desired to inspect the records showing the assessment and levy of the taxes in question: Will it be contended that a subpoena *duces tecum* on a trial of the injunction affords him an adequate remedy? Or will it be contended that because he desires to use the information for the purpose of his suit, he should therefore be denied the relief asked? It seems to us that neither one of these propositions can be maintained. An inspection might obviate the necessity of bringing suit or of prosecuting a suit already begun. In such a case a party having a right to inspect a record would be compelled to bring an action in order to obtain a subpoena *duces tecum*, and the information thus obtained might be entirely too late to be of any value whatever. The question is one of right. If the right is denied, mandamus is the only adequate remedy. As said before, there can be no doubt that the records of the city engineer's office are public records. They are therefore subject to inspection certainly by a citizen and one who has an interest in them, subject to such reasonable rules and regulations as may be provided. Being public records, and the plaintiff having the right to inspect them, it was the duty of the city engineer to afford plaintiff or her attorney a reasonable opportunity to inspect them, regardless of the fact that

they were to be inspected for purposes of a pending suit against the city. If the right to inspection exists, it should not be denied where the inspection is sought for a lawful purpose. Any other rule would rob public records of their public character, and make the right of inspection dependent upon the whims and caprices of the officers in charge.

Some of the older cases make a distinction between an examination of public records by the public in general and an examination by those having an interest in them, holding that in the latter case the right exists, while in the former it does not. *Am. & Eng. Encyclo. of Law*, Vol. 24, pages 182, 183. It is unnecessary in this case to determine whether or not this distinction prevails in this state. It is sufficient to say that plaintiff is not only a citizen and taxpayer, but has shown an interest in the records in question. Having been wrongfully denied access to the records in question, she is entitled to a writ of mandamus commanding the city engineer and the city to furnish her reasonable facilities for making an inspection and examination of the records.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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### **Holtman v. Bullock.**

(Decided June 20, 1913).

#### **Appeal from Jefferson Circuit Court (Common Pleas Branch, First Division).**

1. **Malicious Prosecution—Evidence—Failure of Proof—Peremptory.**—Where in an action for malicious prosecution it appears that plaintiff has been prosecuted by defendant on several charges of breach of the peace, and there is nothing in plaintiff's evidence to show that it relates to the prosecution for which damages are sought, there is a failure of proof and a peremptory instruction in favor of the defendant is proper.
2. **Appeal—Record—Pleadings.**—An amended petition not made a part of the record by order of court or bill of exceptions cannot be considered on appeal.
3. **Malicious Prosecution—Evidence—Record of Another Prosecution Not Receivable.**—In an action for damages for malicious prosecution, the record of a prosecution different from that for which damages are sought, was properly excluded.

POPHAM, TRUSTY & ROOSE and D. MOXLEY for appellant.

D. R. CASTLEMAN and PRYOR & CASTLEMAN for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Plaintiff, Louise Bullock Holtman, brought this action against defendant, J. R. Bullock, to recover damages for malicious prosecution. At the conclusion of her evidence, the trial court peremptorily instructed the jury to find for the defendant. Plaintiff appeals.

The petition charges that the defendant, on March 24, 1908, without any probable cause, caused plaintiff to be arrested and charged with the crime of breach of the peace, and did swear to an affidavit in the court of Justice O'Connor, a justice of the peace of Jefferson county, a court having jurisdiction of said crime, charging plaintiff with said crime, and did maliciously and without any probable cause, prosecute plaintiff for said offense in said court, and did further, without any cause or probable cause to believe plaintiff guilty of said crime, prosecute said case against her in the Jefferson Circuit Court; that upon the calling of the case in the Jefferson Circuit Court, plaintiff was dismissed. A motion to make the petition more specific was sustained, and thereupon plaintiff filed an amended petition charging that the defendant, by false and fraudulent statements and testimony, procured a judgment of guilty against the plaintiff, and that said judgment was procured by fraud. A second motion to make the petition more specific was sustained. Thereupon she again amended her petition and alleged that the affidavit for her arrest stated that plaintiff, on the 17th day of May, 1907, at Deer Park, in Jefferson County, committed the crime of breach of the peace, and that said crime was committed on the premises owned by the affiant. The amendment further states the facts to which defendant testified at her trial, and alleges that said testimony was false and fraudulent. In addition to a denial of the allegations of the petition, and the various amendments thereto, defendant pleaded the conviction of plaintiff.

On a trial of this action plaintiff was asked: "Were you, about the 24th of August, 1908, charged with any offense by Mr. Bullock, the defendant in this case?" and answered, "Yes, sir, I was." She then went on to detail the circumstances of the trial and the facts con-

nected with the offenses charged, stating that the testimony which defendant gave at the trial was false and fraudulent. Upon the conclusion of her testimony she offered in evidence the record of the proceedings in Squire O'Connor's court in the prosecution against her for breach of the peace alleged to have been committed on March 16, 1908, and based on a warrant issued March 24, 1908. The court refused to permit this record to be filed. Thereupon the plaintiff offered an amended petition asking for damages for the prosecution covered by the excluded record. The court declined to permit this amendment to be filed.

We have carefully read plaintiff's evidence. She nowhere refers to the prosecution based on the warrant of March 24, 1908. There is nothing in her testimony to identify either the trial of which she speaks or the breach of the peace in regard to which she testifies as the prosecution or fraudulent conviction for which she seeks damages. It appears that plaintiff was arrested several times at the instance of defendant. The testimony she gives is equally applicable to any one of these prosecutions. Indeed, the fact that she offered the record in another prosecution tends to show that she was speaking of that prosecution instead of the one sued on. That being true, there was an entire failure of proof, and the trial court properly directed a finding in favor of the defendant.

As the amended petition is not made a part of the record, either by order of court or by bill of exceptions, it cannot be considered on appeal. *Koke's Admr. v. Andrews Steel Co.*, 149 Ky., 627; *Hortsman v. C. & L. R. R. Co.*, 18 B. Mon., 218; *Beckham v. Slaydon*, 107 S. W., 324, 32 Ky. L. R., 1348.

Of course the court did not err in excluding from the consideration of the jury the record of a prosecution different from that for which damages were sought: Judgment affirmed.

**Chesapeake & Ohio Railway Company v. Louisville & Nashville Railroad Company.**

(Decided June 20, 1913).

Appeal from Jefferson Circuit Court  
(Common Pleas Branch, Third Division).

**Contracts—Between Two Railroads As To Use of Railroad—Apportionment of Taxes and Franchise Taxes.**—Under a contract between two railroad companies by which one granted to the other the right to use a part of its railroad, the grantee agreeing to pay its proportion of the taxes on that part of the railroad according to the number of engines and cars which each run over it, the grantee having no use for the grantor's engines and cars, the grantee is not responsible for the tax on the grantor's engines and cars or for the franchise tax of the grantor, the franchise tax being a tax on the intangible property of the grantor.

HUMPHREY, MIDDLETON & HUMPHREY for appellant.

HELM & HELM, H. L. STONE, BENJAMIN D. WARFIELD and C. H. MOORMAN for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Reversing.

On March 23, 1895, a written contract was entered into between the Louisville & Nashville Railroad Company of the one part and the Elizabethtown, Lexington and Big Sandy Railroad Company and the Chesapeake and Ohio Railway Company of the second part by which the Louisville and Nashville Railroad Company granted to the other two companies jointly and severally the right to use jointly with it its line of railway between Lexington and Louisville, Kentucky, including sidings, and switches, water tanks, real estate, and all other property incident and necessary to the use of the railroad for the purpose of running passenger and freight trains. It was stipulated in the contract that all business originating upon the line between Louisville and Lexington, exclusive of business from either of these points to the other, should belong exclusively to the grantor, and that the grantees should pay the grantor a certain per cent of all fares collected by them. In addition to this they were to pay a rental of \$5,000 a month. The seventh clause of the contract is in these words:

“Seventh. In addition to the fixed rentals or interest moneys and other payments to be paid as here-

inafter provided the second parties agree to pay such proportion of the cost of maintenance, repairs, renewals, and improvements of that part of the road jointly used, and such proportion of the wages of telegraph operators and other employes and officers in the joint service of the two parties under this contract, as the number of engines and car miles of the parties of the second part run over said railway bears to the total number of engines and car miles run over said railway; it being understood and agreed that no charge shall be made for services of general or accounting officers of the party of the first part, except for such as are actually "employed in conducting the business of this particular part of the lines of the party of the first part.

"The said second parties also agree, as part payment for their said use of said line of railway and facilities, to pay to the said first party their like proportionate share of all taxes and public rates assessed on such portion of first parties said line of railway, such share of said taxes and public rates to be based upon the car and engine mileage as hereinbefore provided in regard to maintenance, etc., which share of taxes and public rates shall be paid to the first party by the second parties within fifteen days from the date when the first party presents to the second parties, or either of them, receipted tax bills showing the amount of taxes paid by first party on such portion of its railway.

"The first party shall keep an accurate account of all such cost and expense of maintenance, etc., to be jointly borne by the parties hereto, and shall furnish the second parties with a copy of the same on or before the fifteenth day of each month succeeding the month for which statement is rendered and the amount due from the second parties to the first party on such account shall be paid on or before the fifteenth day of the month following the month in which said statement is rendered. Satisfactory evidence of all disbursements made on account of maintenance or additional construction, shall be furnished as desired by the second parties."

The controversy before us arises upon the proper construction of the words "all taxes and public rates assessed on such portion of first party's said line of railway." Under sections 4096-4098 Ky. Stats., the value of all the railroads of the state for the purpose of being operated as carriers of freight and passengers in-

cluding engines and cars, depot grounds and improvements and other real estate is fixed by the railroad commission. In addition to this valuation of the physical properties of every railroad company by the railroad commission, the Board of Valuation and Assessment under sections 4077-4081 Ky. Stats., ascertains the total value of all the property of every railroad company including all its franchises and incorporeal rights or intangible property, and from this total valuation is subtracted the value of its physical property as fixed by the railroad commission. The balance left is the amount on which a tax is levied under these sections, and this tax as well as the tax on the physical property is apportioned to each taxing district according to the number of miles of the railroad in it. The grantees in the above contract insist that they are liable under the contract only for their proportion of the taxes on the physical property of the railway between Lexington and Louisville, excluding the engines and cars of the grantor. The grantor insists that they are liable for their proportion of the entire tax levied on the valuation fixed by the railroad commission, and in addition to this for their proportion of its franchise tax as fixed by the Board of Valuation and Assessment. The circuit court sustained the latter view. The grantees appeal.

In *Louisville and Nashville Railroad Company v. City of Henderson*, 154 Ky., 575, we hold that the franchise tax levied under sections 4077-4081 Ky. Stats., is only a tax on the intangible property of the company. The assessment made by the railroad commission under section 4096 Ky. Stats., is made as the value of the physical property of the railroad company "for the purpose of being operated as a carrier of freight and passengers." The contract before us binds the grantees to pay their "proportionate share of all taxes and public rates assessed on such portion of first party's said line of railway." This language naturally construed includes only taxes levied upon the line of railway between Lexington and Louisville, and when this line of railway is assessed at its value for the purpose of being operated as a carrier of freight and passengers,, the taxes on such assessments are all that the language of the contract naturally construed, fairly includes. To hold that these words include taxes on the intangible property of the grantor would be to extend their meaning beyond the words of the contract. To illustrate, the

rent which the grantees pay, the money which they turn over from the fares collected by them, all go to swell the income of the grantor, and to increase the amount of its assessment under section 4077, and manifestly it was not contemplated by the contract that the grantees were to pay taxes on the money which they paid the grantor for rent. The grantor may own a large amount of stocks and bonds, or other personal property, but certainly it was not contemplated by the contract that the grantees were to pay the taxes on these. We have decided that the grantees exercise their own franchise over this line of railway, and must pay a franchise tax thereon. (*Jefferson Co. v. Board, etc.*, 117 Ky., 531). And certainly it was not contemplated that the grantees were to pay their own franchise taxes for operating these roads, and in addition pay a part of the grantor's franchise tax.

As to the engines and cars of the grantor we reach a similar conclusion. The grantees have no use of these engines and cars as they use their own engines and cars. In contracting that they would pay their share of the taxes on the railroad, they were evidently influenced by the fact that they enjoyed the use of the railroad, but it is not to be presumed that they were to pay taxes on engines and cars which they did not use and which were used exclusively by the grantor. The language of the contract only includes taxes on the railroad. It is true that in valuing the railroad at so much a mile, the railroad commission takes into consideration the engines and cars, and includes them in the assessment. But how much these things swell the assessment can readily be ascertained by reference to the reports filed with the railroad commission and comparing the values given in the reports with the values fixed by the commission.

We, therefore, conclude that the grantees under the contract are not liable either for the franchise tax of the grantor or for the taxes on its engines and cars.

Judgment reversed and cause remanded for a judgment as above indicated.

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### **Jones v. Commonwealth.**

(Decided June 20, 1913).

Appeal from Whitley Circuit Court.

1. Criminal Law—Trial—Evidence—Private Writings—Admissibility.  
—In a prosecution for assault with intent to have carnal knowledge



of a female, an anonymous letter containing an offer of a reward in money to any girl who would prefer charges against the accused which would result in his prosecution, conviction and confinement in the penitentiary, if knowledge of the contents thereof are brought home to the prosecuting witness, is admissible as tending to show the motive of the prosecuting witness in investigating the prosecution. Unless such knowledge on the part of the prosecuting witness is shown, such writing is incompetent for any purpose.

2. Criminal Law—Trial—Continuance—Affidavit as to Statements of Absent Witnesses.—It is error for the trial court to refuse a continuance, where trial is ordered at the indicting term and accused has filed his affidavit showing due diligence in procuring the attendance of material witnesses and setting forth facts the absent witnesses would swear to, if present, unless, with the consent of the Commonwealth attorney, such statements of the absent witnesses should be admitted by the Commonwealth to be true and so read to the jury.

R. S. ROSE for appellant.

JAMES GARNETT, Attorney General, OVERTON S. HOGAN, Assistant Attorney General for appellee.

#### OPINION OF THE COURT BY JUDGE LASSING—Reversing.

Ancil Jones was indicted and tried, at the February, 1913, term of the Whitley Circuit Court, on the charge of assault with intent to have carnal knowledge of Ella Francis. He was found guilty and given an indeterminate sentence of from two to seven years in the penitentiary. To reverse that judgment, he prosecutes this appeal.

While several grounds are set up in the motion for a new trial, but two are relied upon for reversal here. Error of the court in refusing to grant him a continuance, and error in excluding evidence.

The prosecuting witness, Ella Francis, was a girl fourteen years old. She lived some four or five miles from the home of appellant. On Sunday afternoon, appellant went to the home of her father and, with his consent, employed her to work for him. On the day following, appellant sent his wife for her, and they reached appellant's home about four o'clock in the afternoon. She remained there over night and left sometime the following day, arriving home either just before or shortly after the noon hour. Later in the day, she, in company with her father, went before a justice of the peace and caused a warrant to be issued for appellant, charging him with

the offense for which he was ultimately indicted and tried.

She testified that on the evening of her arrival, in the absence of his wife from the room, appellant made indecent proposals to her; that she was put to sleep in a room adjoining that in which appellant and his wife slept; that before daylight and, according to her best judgment, about five o'clock in the morning, she was awakened by appellant attempting to get into the bed with her; that he took hold of her and, in addition to making indecent proposals to her, assured her that he could prevent any evil consequences resulting from her having intercourse with him, that she broke away from him, went into the other room and attempted to notify his wife as to his behavior; that he followed her into the room and got in bed with his wife, and left her sitting by the fire; that as soon as it was daylight she left without eating breakfast, and returned to her home.

Appellant testifies to her arrival at his house about the time indicated by her in her testimony; denied that he made any indecent proposals to her; says that she slept that night with his wife, while he occupied a bed in another room; alleges that she was not cleanly in her habits and, upon conference with his wife, they decided that they did not want to keep her and sent her home.

The trial took place at the indictment term. He filed his affidavit alleging that he was not ready for trial by reason of the absence of certain material witnesses. He set out in this affidavit what these witnesses, if present, would swear to, and alleged that he had caused subpoenas to be issued for them and placed in the hands of the sheriff, that he was unable to find the subpoenas and did not know whether they had been served or not. The court overruled his motion for a continuance, caused an attachment to be issued for the witness, some of whom were brought into court in response thereto. Others were not.

The trial proceeded. During its progress, appellant offered to show that an anonymous letter had been found pinned to the door of a schoolhouse in a district adjoining that in which the prosecuting witness lived. In this letter, a reward of \$50 was offered to any girl who would prefer such charges against appellant as would result in his conviction and confinement in the penitentiary. The court refused to permit this anonymous letter to be read in evidence to the jury, evidently upon the theory that

appellant had failed, in any wise, to connect the prosecuting witness with it or to show that she had any knowledge of its existence. Of this ruling appellant complains.

Undoubtedly, if the prosecuting witness could be shown to have had knowledge of the offer of a reward of \$50 for preferring charges against appellant that would result in his conviction and imprisonment in the penitentiary, this evidence should go to the jury for what it is worth as tending to establish a motive on the part of the prosecuting witness for instigating the prosecution. But, inasmuch as it was not shown that she had any knowledge of the existence of such writing and in the absence of facts and circumstances adduced in evidence, from which it could fairly be inferred that knowledge or information of the contents of this writing had been brought home to her, the court properly held it incompetent for any purpose.

In his affidavit for a continuance, appellant alleged that he could prove by certain of the absent witnesses that the prosecuting witness was an unchaste character, lewd and dissolute in her habits. Evidence of this character is admissible for the purpose of affecting the credibility of the prosecuting witness, and as, under the evidence adduced, the jury had merely her statement upon the one side and appellant's upon the other, the materiality of evidence of this character is at once apparent.

Under section 189 of the Criminal Code regulating procedure, where an application for a continuance is made at the indictment term, when the affidavit was made by appellant, showing the exercise of due diligence on his part in procuring the attendance of his witnesses and that, notwithstanding such diligence, he had failed to procure their attendance and the affidavit, in other particulars conforming to the requirements of the law, the court should either have granted the continuance or else have directed the trial to proceed with the consent of the Commonwealth's attorney that the affidavit as to what the absent witnesses would say might be ready to the jury as true. Under this well recognized and established rule of practice, had the statement of these absent witnesses, as found in this affidavit, been read to the jury, the Commonwealth's attorney would have been put to the necessity of admitting that the prosecuting witness was of lewd and dissolute habits and he would not have

been permitted to introduce evidence to the contrary. Thus, it is at once apparent that such admission on the part of the Commonwealth would have been most damaging to its case and would have been correspondingly advantageous to the accused. When an affidavit is filed at the indictment term seeking a continuance and the statements therein contained show that the affiant has used diligence to procure the attendance of his witnesses and then sets out in his affidavit a statement of what the absent witnesses, if present, would swear to, and that they are absent without his knowledge, procurement or consent, unless the Commonwealth will agree that the statement of what the absent witnesses would testify to shall be read to the jury as true and conceded by him to be true, it is the duty of the trial court to continue the case.

The affidavit in the case at bar meets these requirements of the law, and the court erred in not granting a continuance.

If, upon another trial, appellant is able to show that the prosecuting witness knew of the existence of this anonymous letter offered in evidence upon the last trial, or can show circumstances from which it might be reasonably inferred that she had knowledge or notice of its existence, then the writing should be admitted in evidence as tending to show a motive for the prosecution. In the absence of such showing on the part of appellant, this writing is not competent for any purpose.

Because of the error of the trial court in refusing to grant a continuance or permitting the affidavit as to what the absent witnesses would say to be read to the jury as true, the case must be reversed for further proceedings consistent herewith, and it is so ordered.

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### **Cumberland Telephone & Telegraph Company v. Brandon.**

(Decided June 20, 1913).

#### **Appeal from Calloway Circuit Court.**

**Telephone and Telegraph Companies—Power of Operator to Contract—Contract to Deliver Oral Message—Actual Authority—Apparent Authority—Rule.—A rule of a telephone company forbidding operators to deliver oral messages is reasonable, but the**

publication of the rule in books issued to its subscribers is not notice to one not a subscriber, and a contract with a non-subscriber made by an operator to deliver an oral message upon the payment of a fee of 25 cents, being within the scope of his apparent authority, is binding on the company in the absence of notice to the sender of any limitation upon the power of the operator to contract.

WHEELER & HUGHES for appellant.

HOLLAND & HANBERRY and THOMAS P. COOK for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Plaintiff, John Brandon, brought this action against defendant, Cumberland Telephone & Telegraph Company, to recover damages for its failure to deliver to him a message announcing that his mother was not expected to live. On the first trial of the case the court directed a verdict in favor of defendant. In reversing the case the court said:

“Whether or not Phillips, as a local subscriber, had a right to demand that this message be delivered, or whether or not the company was engaged in the business of delivering messages for local subscribers, or whether or not the operator at Murray had authority to receive this message and agree to deliver it, or what his duties were in connection with messages of this character, we refrain from discussing. We only decide that on the facts before us the case should have gone to the jury.”

On the return of the case another trial was had which resulted in a verdict and judgment in favor of plaintiff for \$500. The defendant appeals.

The facts developed on the trial are substantially as follows: On March 8, 1911, plaintiff was a resident of the city of Murray, Kentucky, and resided within three blocks of the exchange of the defendant. His brother-in-law, A. R. Phillips, lived about eight miles in the country. Neither plaintiff nor his brother-in-law was a subscriber of the defendant. Phillips was a subscriber to the Hazel Telephone Company, and had an instrument in his house. Plaintiff's mother, who lived with Phillips, had been in feeble health for some time. According to the evidence for plaintiff, she was taken suddenly worse on March 8th. Some time between seven and eight o'clock, p. m., Phillips called the Hazel ex-

change and got connection with the defendant's exchange at Murray. He asked the operator at Murray if he could deliver a message for him to John Brandon. The operator told him he could, but it would cost him a quarter. Whereupon Phillips said, "All right; I will pay that, or whatever you charge." The operator thereupon agreed to deliver the message. Phillips then gave to the Murray operator the following message: "John Brandon, Murray, Ky., Your mother is not expected to live until morning. Come at once. A. R. Phillips." This message was repeated by the Murray operator to Phillips. The message was never delivered to plaintiff. had he received it, he says, he could and would have gone at once to his mother's bed-side, and could have reached her before her death, which occurred about 11:15 a. m., the next day. The evidence for plaintiff further tends to show that there was a contract between the two companies by which the subscribers of each had the right to talk to any subscriber of the other, and that either company, in performing a service for the subscriber of the other, looked to the other company to collect its fees. In this case the fee of 25 cents was collected by the Hazel Company.

According to the evidence for the defendant, no message from Phillips to Brandon was received at the exchange at Murray between seven and eight o'clock. It was not received until between ten and eleven o'clock that night. Bynum, the operator in charge at that time, says that he had a conversation with Phillips between ten and eleven o'clock on the night of the 8th. As to the conversation, he testifies as follows:

"I received a message from Mr. Phillips. Mr. Phillips called and asked if that was Murray. I said 'Yes, sir.' He says 'I will O. K. a 10 cent message fee, and pay it the next time I come to Murray, if you will send word to Mr. Brandon that his mother is very ill.' I says 'I will try to get word to him.' I tried everywhere—all points in town—where I thought I could find a messenger boy, and couldn't find one nowhere; it was about eleven o'clock at night."

Bynum further says that he called at the livery stable where he generally found messenger boys, and also the hotel and several groceries, but failed to find a messenger. He knew he had no authority to take a message and deliver it to Brandon for pay. He didn't agree to deliver said message for pay. He attempted to de-

liver the message as a matter of accommodation to Mr. Phillips and Mr. Brandon, whom he knew. Defendant also introduced the books of the company which are printed and delivered to the subscribers of the Murray exchange. These books contain the rules that were in force at the time, and one of the rules is as follows: "Employees of the Cumberland Telephone & Telegraph Company, Incorporated, are positively forbidden to take oral messages." There was also evidence to the effect that while Phillips, as a subscriber of the Hazel Telephone Company, under the contract between the companies, had the right to demand, through defendant's exchange at Murray, connection with any subscriber of defendant's Murray exchange, yet the agreement did not authorize any subscriber to either the Hazel or Murray exchange to use the long distance toll lines of the defendant without paying therefor. The evidence shows that Bynum, the operator in charge of the switching at the Murray exchange, was a local operator. In order to deliver the message he would have been compelled to leave the switch-board. It was further shown that defendant was not engaged in the business of delivering messages for local subscribers for pay.

The principal contention of the defendant is that the trial court erred in refusing to direct a verdict in its favor. The basis of this contention is that a telephone company has the undoubted power to make reasonable rules and regulations regarding the conduct of its business with the public; that the rule forbidding employees to take oral messages is reasonable; that the publication of the rule in the book which defendant issued to its subscribers was sufficient notice to its patrons, in the absence of actual knowledge on the part of such patrons, that it was not within the scope of the operator's apparent authority to contract for the delivery of an oral message, and as the company did not hold itself out as contracting to receive or deliver oral messages at the local exchange, it is not liable for a failure to deliver such message, though the local operator agreed to deliver it. The evidence in this case, however, shows that Bynum was the operator in charge both of local and long distance connections. It was certainly not incumbent upon Phillips to call for any superior officer and ascertain whether or not Bynum had authority to make the contract in question. As Bynum was

in charge, and was the only person to whom Phillips was required to look, Phillips had the right to assume, in the absence of notice to the contrary, that he had authority to bind the company. Bynum's act, therefore, was clearly within the scope of his apparent authority. The mere publication of the rule in question, in the books issued to its subscribers, was not notice to Phillips, who was a non-subscriber. It is argued, however, that this view of the law places the telephone company at the mercy of an operator who disobeys its rules, for he, in violation of its rules, may make a contract that will subject it to a liability never contemplated by it. In a sense this is true, but it is a risk which the principal always takes when he invests an agent with apparent authority. In such a case one of two things must happen: Either the company or the patron must suffer. No fault can be imputed to the patron, for he acts without knowledge of any limitation on the power of the operator. The company, however, employs and discharges the operator. It has control over him. If he exceeds his actual authority and makes a contract within the scope of his apparent authority, he is, nevertheless, the company's agent, and the loss should fall upon it, whose fault it is in having an agent who violates its rules, rather than upon the patron, who has no control over him and who is in no way responsible for his acts. It is immaterial that the company had no messenger at hand by means of which it could carry out the contract. If notice of the operator's limited authority was not brought home to Phillips, the making of the contract in question was within the scope of the operator's apparent authority, and the company is bound by the contract which he made, and the fact that he had no means of carrying out the contract is no defense. This rule does not conflict with the doctrine laid down in the case of *Cumberland Tel. & Tel. Co. v. Atherton*, 112 Ky., 155. In that case the contract to deliver the message was made by a messenger boy. The court held that the nature of his agency—a mere messenger—was notice of the limitation upon his power to enter into contracts for the telephone company.

While one of the instructions is subject to verbal criticism, we conclude that the instructions fairly presented the law of the case.

Judgment affirmed.



**Pugh v. Jackson, Jr.**

(Decided June 20, 1913).

**Appeal from Laurel Circuit Court.**

1. **Contracts—Damages—Pleading.**—Where plaintiff leased a coal mine from a company of which defendant was president, and defendant agreed with plaintiff to make his pay rolls at the end of each week, and plaintiff seeks damages for a breach of the contract by defendant, a petition which sets forth the terms of the agreement, the consideration, the violation of the agreement by defendant, the fact that plaintiff could and would have mined the coal at a profit, and that he was damaged by defendant's breach of the contract in the sum of \$1,260, is sufficient.
2. **Contracts—Validity.**—Where plaintiff leases a mine from a company of which defendant is president, and agrees with plaintiff to make his weekly pay rolls until all the coal is mined, the contract is not void for indefiniteness.
3. **Contracts—Consideration.**—Where plaintiff has leased a mine from a company of which defendant is president, and the defendant is to make plaintiff's weekly pay rolls in consideration of a commission of 5 cents per ton for selling the coal, the consideration is sufficient to support the contract.
4. **Contracts—Evidence—Peremptory Instruction.**—Where plaintiff leases a coal mine from the company of which defendant is president, and defendant in consideration of a commission of five cents per ton for selling the coal, agrees to make the weekly pay rolls for plaintiff, defendant is not entitled to a peremptory instruction on the ground that for the first two weeks the mine was operated the pay rolls exceeded the output of the mine, in view of the evidence to the effect that the mine had to be cleaned up and put in proper condition, and it cannot be said as a matter of law that defendant gave plaintiff a reasonable opportunity to determine whether or not the coal could have been mined at a profit.
5. **Contracts—Breach—Damages—Instruction.**—In an action for damages for breach of a contract, instructions examined and held properly to present the law of the case.
6. **Contracts—Damages—Measure.**—Where plaintiff leases a mine from a company of which defendant is president, and defendant, in consideration of a commission of five cents per ton for selling the coal, agrees to make the pay rolls for plaintiff, damages by way of profit for a breach of the contract by defendant are within the reasonable contemplation of the parties, and may be recovered if not too remote or speculative to be capable of legal ascertainment.
7. **Contracts—Damages.**—Where plaintiff leases from a company of which defendant is president a coal mine, and defendant agrees, in consideration of a commission of five cents per ton for selling the coal, to make the weekly pay rolls for plaintiff, evidence in an action for breach of the contract examined and held sufficient

to show that plaintiff could and would have mined the coal at a profit, and to sustain a verdict in his favor.

SAM C. HARDIN for appellant,

H. J. JOHNSON and C. C. WILLIAMS for appellee,

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Sometime prior to the 23d of February, 1912, plaintiff, Robert M. Jackson, Jr., entered into a contract with the Pitman Coal Company, which was afterwards reduced to writing. Under this contract he leased from the Pitman Coal Company all the coal between the Pittsburgh Coal Company's line and the Pitman Coal Company's switch. Under the terms of the agreement, plaintiff was to receive 85 cents per ton, the Pitman Coal Company 5 cents per ton, the Pittsburgh Coal Company 5 cents per ton, and W. A. Pugh, who as agent, was to dispose of the coal, 5 cents per ton. About the time this contract was entered into plaintiff entered into a verbal contract with W. A. Pugh, who was the president of the Pitman Coal Company. Pugh agreed "to make the weekly pay-roll" for plaintiff. In other words, he was to furnish plaintiff the money to pay his hands. Some time after this contract was entered into, Pugh refused to comply with his contract, and plaintiff was compelled to abandon the work because of insufficient funds to carry it on. He thereupon brought this action to recover damages in the sum of \$1,260. A trial before a jury resulted in a verdict and judgment in his favor for \$600. Defendant appeals.

The evidence shows that pursuant to the lease referred to and the oral contract with defendant, plaintiff began the work of mining. Before calling on defendant for money to pay his hands, plaintiff used some money which he had gotten from his wife, and all the money that he had. The first week that he applied to defendant for money, defendant furnished it. The second week defendant declined to furnish any money. On cross-examination it was developed that plaintiff's pay-roll for the first week as well as that for the second week exceeded the market value of the coal mined. Plaintiff claims that this was due to the fact that the mine was dirty and out of repair, and that his men, instead of being engaged in the work of mining, had to clean up the

mine. In brief, the defendant's testimony is to the effect that he did not agree to advance plaintiff any money in excess of 85 per cent of the coal mined. After defendant's refusal to make the pay rolls, plaintiff endeavored to get the money from other quarters, but was unable to do so. The evidence for plaintiff further shows the amount of coal in the mine, and that they could have mined the coal so as to make a profit of \$1,000 to \$1,200 under the contract. The evidence for defendant is that plaintiff was actually mining the coal at a loss at the time, and that if he continued mining the coal he would have lost money under the contract.

The petition as amended was not bad on demurrer. It set forth in detail the terms of the contract, the consideration for the defendant's agreement, to-wit: The fact that he was to receive a commission of 5 cents per ton on the sale of the coal; the violation of the agreement by defendant, the fact that plaintiff could and would have mined, under his contract, coal at a profit, and that he was damaged by defendant's breach of the contract in the sum of \$1,260.

The contract relied on is not void on the ground of indefiniteness or want of consideration. Plaintiff had a valid lease for the mine in question. He alleges and proves that the contract of defendant to make the pay rolls was to continue until the coal was mined. The fact that defendant would receive 5 cents per ton for selling the coal was sufficient consideration for the contract.

Defendant was not entitled to a peremptory instruction because plaintiff's evidence showed that for the first two weeks the mine was operated the pay-rolls exceeded the value of the output. Considering the fact that the mine was out of condition, and had to be cleaned and put in proper condition, it cannot be said as a matter of law that defendant gave plaintiff a reasonable opportunity to determine whether the coal could have been mined at a profit or not. Had it been conclusively shown that the plaintiff could not have mined the coal at a profit, then, of course, defendant would have been entitled to a peremptory, for he would not have been required to keep on making the pay-rolls, and risk his money on the security of the coal, the value of which was much less than the money which he was required to furnish. The jury, however, decided that plaintiff would and could have mined the coal at a profit.

The court, in its instructions, told the jury in substance that if they believed that it was a contract between the parties, and that while plaintiff was engaged in operating the mine defendant failed and refused to furnish plaintiff sufficient money at the end of each week to pay plaintiff's hands and miners for their labor, and further believed from the evidence that plaintiff could and would have mined all the coal from said tract of land, and that he was compelled to quit work and abandon said mine for lack of sufficient funds to pay his hands, and by reason of defendant's failure to furnish him sufficient money at the end of each week with which to do so; and further believe from the evidence that plaintiff could and would have operated said mine so that the cost of same would have been less than 85 cents per ton for all the coal taken from the mine, then the law was for the plaintiff and the jury should so find. On the other hand, the court told the jury that if they believed from the evidence that under the contract between plaintiff and defendant, defendant was to furnish the plaintiff, at the end of each week, only a sufficient amount of money to pay plaintiff 85 cents per ton for all the coal he had mined from the  $3\frac{1}{2}$  acres of land mentioned in the evidence, and placed in the cars for shipment during the week, then they should find for the defendant.

In another instruction the court fixed the measure of damages at the difference between 85 cents per ton and the cost of mining the coal and placing it in the railroad cars for shipment.

It will be seen that the instructions present the theory of each side, and, in our opinion, are not subject to criticism. The measure of damages is correct. This is not an ordinary case of a breach of contract to lend money. The defendant was not only interested in the mine which he had leased to plaintiff, but was himself to receive a commission of 5 cents per ton for selling and disposing of the coal. The chief inducement for plaintiff to lease the mine was the agreement on the part of defendant to furnish him the money to pay his hands at the end of each week, as they would work on cheaper terms if paid in cash. Plaintiff leased the mine to make money out of it. Defendant knew that he leased it for that purpose. Under these circumstances, we conclude that the damages by way of profits which plaintiff would have made were within the reasonable contemplation of the parties at the time of the execution of the contract. The

fundamental and cardinal principle that underlies all rules for the admeasurement of damages is that the injured party shall have compensation for that which he has directly lost by reason of the act of the other party, so far as such loss was or ought to have been in the contemplation of the parties. This includes the loss of anticipated profits where these are capable of legal ascertainment. *Equitable Mortgage Co. v. Thorn* (Tex.), 26 S. W., 276; *Holt v. United Security L. Ins. & T. Co.* (N. J.), 72 Atlantic, 301, 21 L. R. A. (N. S.), 691. In the present case the profits were not so speculative or remote as to be incapable of legal ascertainment. The price which plaintiff was to receive for the coal was fixed at 85 cents, after the payment of certain commissions and royalties. To ascertain the profits, therefore, it was only necessary to determine the cost of mining the coal and placing it on the car. There was evidence before the jury from which the cost could be determined, and we cannot say that their finding is flagrantly against the evidence.

Judgment affirmed.

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### American Patriots v. Cavanaugh.

(Decided June 20, 913).

#### Appeal from Christian Circuit Court.

1. Insurance, Life—Mutual Benefit Societies—Action to Recover in Excess of Sum Paid Beneficiary—Tender—Necessity For.—Where a mutual benefit society pays to a beneficiary a certain sum which it admits was due under the policy, no tender of the sum so paid is necessary in order to enable the beneficiary to sue for the balance alleged to be due under the contract.
2. Insurance, Life—Failure to Attach By-Laws to Policy—Statutory Provision—Effect.—A certificate of insurance issued by a fraternal benefit society in the year 1904 is governed by the provisions of section 679, Kentucky Statutes, 1903, requiring the by-laws of the mutual benefit society to be attached to and made a part of the certificate, and not by the amendment of 1906, exempting fraternal societies from the operation of the statute.
3. Insurance, Life—Fraternal—Constitution and By-Laws Not Attached to Certificate—Liability Under Certificate.—Where the constitution and by-laws of a fraternal benefit society are not attached to the certificate of insurance, as required by section 679, Kentucky Statutes, 1903, and cannot, therefore, be received in evidence or considered a part of the contract, a certificate of in-

insurance providing that the members shall be entitled "to participate in the benefit fund of the National Fraternal Union, in the sum of not to exceed \$1,000, payable in case of his death to his wife, Elmira Cavanaugh, as now or may hereafter be provided for in the constitution and laws of the order," is a contract of insurance for \$1,000.

4. Insurance, Life—Fraternal—Compromise—Fraud—Evidence.—Where the beneficiary in a certificate of insurance accepted less than was due under the certificate, and sued to recover the balance on the ground that the alleged settlement was obtained by fraud, evidence examined, and held to justify a submission of the question to the jury.

HUNTER WOOD & SON for appellant,

C. H. BUSH for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

In the month of April, 1904, the National Fraternal Union, a fraternal benefit society created and organized under the laws of this State, issued to Lee Cavanaugh, of Hopkinsville, Kentucky, a certificate of membership entitling him "to participate in the benefit fund of the National Fraternal Union, in the sum of not to exceed \$1,000, payable in case of his death to his wife Elmira Cavanaugh, as now or may hereafter be provided for in the Constitution and Laws of the Order." The certificate also contains the following provision: "The Constitution and laws as now enacted, or as may be hereinafter legally enacted, together with the statements made in the application for this certificate and the answers made in the application for this certificate and the answers made in the health report, shall be and are hereby made the only contract or agreement which shall bind the order for any claims whatsoever." Cavanaugh, in writing, accepted the certificate subject to the terms thereof.

On May 8, 1907, the National Fraternal Union was consolidated with the American Patriots, another fraternal benefit society, which was organized and doing business under the laws of the State of Illinois. Under the articles of consolidation, the business of the consolidated corporation was to continue to be transacted under the charter, constitution and by-laws of the American Patriots, as expressed in the contract of consolidation, "now in force, subject to amendment or repeal as experience or conditions may require." After the afore-

said consolidation, the American Patriots assumed the contracts, obligations and liabilities of the National Fraternal Union, and issued to Lee Cavanaugh the following agreement, which was attached to the certificate of insurance:

"In consideration of the contract of consolidation adopted by the vote of the members of the American Patriots of Springfield, Illinois and the National Fraternal Union of Murray, Ky., both being Fraternal Beneficiary Societies, it is hereby certified that the American Patriots assumes and agrees to pay the benefits promised in Certificate No. 1598 issued to Lee Cavanaugh by the National Fraternal Union; Provided that the member is in good standing at the date of death or disability insured against."

On May 12, 1908, the American Patriots adopted the following amendment to its constitution and by-laws:

"Sec. 101. All members of the Society holding certificates of membership providing for the payment of death benefits but written on lower rates than the table of rates as set forth in Section 52 of the Constitution, may continue their membership in the Order by paying a lower rate, but each such certificate shall be charged with the difference between the rate paid by the member and the rate now in force as shown by the table of rates set forth in Section 52 for the age at which he became a member of the American Patriots, and for a period equal to the expectation of life of a person of that age, as based upon the American Experience Table of Mortality; which amount shall be deducted from any death or total disability benefits that may become due thereunder."

Under the foregoing amendment there was due on the certificate in question only \$545.84, whereas under the by-laws in force at the time the certificate was issued, the amount due was \$780.66.

In the month of July, 1910, Lee Cavanaugh died a member in good standing. The American Patriots paid to his widow, Elmira Cavanaugh, the sum of \$545.84. Thereafter she brought this suit against the American Patriots to recover the difference between that sum and the sum of \$780.66, which she alleged to be due under the certificate, pleading that the receipt from her was obtained by fraud, and that there was no consideration for her agreement to accept less than the amount due.

Defendant denied the fraud, and relied on the settlement, and also pleaded that under its constitution and by-laws as amended, plaintiff was entitled only to the sum paid her. The case was submitted to the jury, which returned a verdict in favor of plaintiff. Judgment was entered accordingly, and defendant appeals.

The evidence as to the circumstances under which payment was made is as follows: Plaintiff says that defendant's representative came to her on the morning of the settlement and told her that he was in a hurry to catch a train which would shortly leave. She says that he represented to her that all her husband was entitled to under the certificate was the sum of \$545.84, and that he had a check for her for that amount. She told him she thought she was going to get a thousand. He replied that a man of her husband's age did not get as much as a young man, and said that she would have to take that amount or nothing. She further says that while she thought there was more due her, yet when the agent told her the amount he offered was all that she was entitled to, she, relying on his statements, and not knowing her rights, accepted that amount, believing that she would get nothing if she did not take the amount offered. On the other hand, the agent of the company testifies that he went to Mrs. Cavanaugh's home on the morning of the settlement. He explained to her that he had come there to make a settlement. He explained to her that under Section 101 of the Constitution, the amendment adopted in the year 1908, she was entitled only to the sum of \$545.84; that the company was settling all claims under the amendment. He and plaintiff argued the matter for quite a while, and finally she agreed to accept the check for \$545.84 as a compromise settlement of her claim.

First it is insisted that the court erred in overruling defendant's demurrer to the petition. The ground of the demurrer is that the petition failed to allege a tender of the amount paid plaintiff. There is no merit in this contention. Plaintiff's claim grew out of the contract. It is admitted by defendant that plaintiff was entitled to the amount paid her. So far as that amount is concerned there is no controversy. She was entitled to that sum in any view of the case. It was therefore, not necessary for plaintiff to restore to the defendant the amount which defendant admitted to be due, in order to recover the balance about which alone there was a



dispute. *Commonwealth Life Insurance Co. v. Hughes*, 144 Ky., 608.

It is insisted that under the by-laws as amended plaintiff was entitled to recover only the amount paid her. As to whether or not the by-law in question was defective as to the certificate issued plaintiff's husband, we deem it unnecessary to decide. At the time the certificate was issued, Section 679, Kentucky Statutes, provides as follows:

"All policies or certificates hereafter issued to persons within the Commonwealth by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the constitution, by-laws or other rules of the corporation, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, and the portion of the constitution, by-laws or other rules referred to; and unless so attached and accompanying the policy, no such application, constitution, by-laws or other rules shall be received as evidence in any controversy between the parties to or interested in said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties. The said policy or certificate, application, constitution, by-laws or other rules shall be plainly printed, and no portion thereof shall be in type smaller than brevier: *Provided, however, That nothing in this section shall be construed as applying to health certificates or constitutional receipts, or other evidences used in reinstatement of a policy or certificate.*"

The foregoing section was amended by Act of March 24, 1906, by the addition of the following provision:

"But the provisions of this section and this subdivision shall not apply to secret or fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, and pay no commission nor employ any agents, except in the organization and supervision of the work of local subordinate lodges or councils."

It has been frequently held that contracts entered into prior to the amendment of 1906 are controlled by the statute then in force, and not by the amendment,

Mooney v. Ancient Order of United Workmen, etc., 72 S. W., 288, 24 Ky. L. R., 1787; Supreme Lodge v. Hunziker, 87 S. W., 1134, 27 Ky. L. R., 1201; Bankers' Fraternal Union v. Donahue, 109 S. W., 878; Sovereign Camp of Woodmen of the World v. Salmon, 120 S. W., 358; American Guild v. Wyatt, 100 S. W., 266, 30 Ky. L. R., 632. In the present case the amendment to the constitution and by-laws relied on by the defendant was not attached to or made a part of the certificate. The case, therefore, comes within the express terms of the statute. It is immaterial that there was no objection to the introduction of the amendment in evidence. The purpose of the statute was not merely to provide a rule of evidence, but it goes further and adds "and shall not be considered a part of the policy or of the contract between such parties." It has accordingly been held that the contract or certificate is the contract between the parties, unless the constitution, by-laws or other papers, referred to in the statute, are attached thereto. American Guild v. Wyatt, *supra*.

But it is insisted that plaintiff's witness, in order to calculate the amount claimed by her to be due on the certificate, had to resort to the constitution and by-laws in force at the time the certificate was issued, and that if the by-laws then in force are to be considered a part of the policy, then the amendment thereto relied on by defendant should, for like reason, be considered a part of the policy. In our opinion, however, neither one was a part of the policy. Excluding them, we conclude that the certificate in question must be held to provide for insurance in the sum of \$1,000. That being true, plaintiff, as a matter of right, was entitled to recover that sum. Not having sued for that sum or prosecuted a cross appeal, the error in this respect cannot be reviewed.

This brings us to a consideration of the claim of fraud. There is very little discrepancy between the evidence of the plaintiff and that of the defendant's agent. The evidence leaves no doubt that plaintiff accepted the amount tendered her believing the statements of defendant's agent that that sum was all she was entitled to and all that she could get under the certificate. That he made these representations there can be no doubt. Had it not been for these representations, plaintiff would not have accepted the sum paid. Furthermore, plaintiff's rights were fixed by her contract. Without understanding her rights, she accepted a sum less than that pro-

vided for in the contract. The acceptance of a sum less than that due, under these circumstances, was without consideration, and the evidence fully justified the submission of the question of fraud to the jury, even if it did not authorize a peremptory instruction in plaintiff's favor.

Judgment affirmed.

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### Baker v. Estridge, et al.

(Decided June 20, 1913).

#### Appeal from Jackson Circuit Court.

**Homestead—Abandonment—Evidence.**—Where land belonging to defendant was sold under an execution, and defendant's grantee, claiming that the land was occupied by defendant and his family as a homestead, resisted a motion to award writ of possession to the purchaser at the execution sale, evidence examined and held to sustain the finding of the trial court that the homestead had not been abandoned.

W. H. CLARK for appellant.

W. E. BEGLEY for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

William Pennington, charging that Elisha Estridge had alienated the affections of his wife, brought suit to recover damages. At the September term, 1911, of the Jackson Circuit Court, judgment was rendered in his favor for the sum of \$1,000. Motion and grounds for new trial were filed, and at the January term of the court the motion was overruled. On January 19, 1912, an execution issued on the judgment and was levied on the land in controversy on January 21, 1912. The land was sold on March 18, 1912, and A. W. Baker became the purchaser. On March 27, 1912, the sheriff made him a deed. On January 1st, and prior to the time the motion for a new trial was overruled, Elihu Estridge, Elisha's brother, bought the land in controversy and obtained a deed therefor from Elisha and wife, which deed was duly recorded in the Jackson county Clerk's office.

After Baker obtained the sheriff's deed, he moved for a writ of possession. Elihu Estridge resisted the

motion, and asserted title to the land by virtue of the deed which he obtained from Elisha on January 1, 1912. He claims that he paid Elisha the sum of \$500 for the land, and that the land was the homestead of Elisha and his family. Baker contends that the homestead was abandoned and that the conveyance to Elihu Estridge was fraudulent. On final hearing the writ of possession was denied, and Baker appeals.

According to the evidence for Baker, Elisha Estridge left his home with Carrie Pennington in the month of February, 1911. On the 8th of June, 1911, they went to Middletown, Ohio, and went to housekeeping. After remaining there about three months, they went to Illinois and lived there two months. About the middle of December Elisha said he wanted to return to see his children, and did go back to Jackson County. Carrie Pennington says that while in Ohio he said he never expected to return to his place again, but that he wanted it for his children. There is also evidence to the effect that when Elisha reached the home of his brother, Elihu, in Garrard County, he sent Elihu for his family. His wife and children came to Elihu's home about December 18, 1911. Baker's witnesses say that their household goods was sent to them prior to January 1st. The land was sold to Elihu on January 1, 1912. Elihu had a tract of land worth about \$4,000, but still owed something like \$2,700 on this tract of land. According to the evidence of Elihu, he went to Jackson County for Elisha's wife and children in December, 1911. They came to his house. After that time the sale was made. During the year previous, and while Elisha was gone, the land in controversy was occupied as a home by Elisha's wife and children. He went for the wife and children because Elisha wanted to see them. On January 1st, he took them to Berea. Elisha and his wife did not care to return to the home if they could make a sale of it, as they preferred to leave the old scenes. They intended, however, to return to the land if they did not sell it. Elihu offered Elisha \$500 for the land, and Elisha accepted the proposition, and Elihu paid for the land. He was abundantly able to pay for the land as he was worth about \$4,000. In addition to the tract of land which he owned in Garrard County, upon which there was a balance due, he had several head of livestock and other personal property. Elisha and Elihu both claim that Elisha and Elihu never had any purpose at all of abandoning his

land, and fully intended to return to his home. The only reason he did not return was because he had made the sale. The evidence further shows that the land in controversy is worth less than \$1,000.

The evidence shows that the tract of land in controversy was occupied as a homestead by Elisha Estridge's wife and children up to within a few days of the sale. Manifestly, if the land was a homestead it could not be subjected to the payment of Elisha's debts, and the sale of it would not be a fraud upon his creditors.

The only question in the case is whether or not there was an abandonment of the homestead between December 18th and January 1st, the day of the sale. If Elisha and his wife and children left the homestead with no fixed purpose of returning thereto, this would constitute an abandonment. It is evident that Elihu went for Elisha's wife and children for the purpose of effecting a reconciliation between them and Elisha. When they left Elihu's residence they intended to return to the farm. The reason they did not, was because they effected a sale of the land. Elihu and Elisha both say that the sale was made and that Elihu paid Elisha for the farm. Elihu was a man of means, and though he owned something on his home farm there is nothing in the record to show that he did not have sufficient credit to obtain the \$500 which he paid for the farm in question. Even if it be true that the furniture in the homestead was packed and carried away before Christmas, this fact is not on the question of abandonment. It is simply a circumstance to be considered in connection with the other facts and circumstances surrounding the case. Here the parties were absent from the homestead for only about twelve or thirteen days before the sale was effected. All the parties declare that they intended to return. Under these circumstances, we see no reason to reverse the finding of the trial court, who was of the opinion that the homestead had not been abandoned.

Judgment affirmed.

**Martin v. Commonwealth.**

(Decided June 20, 1913).

**Appeal from Butler Circuit Court.**

**Intoxicating Liquors—Purchase of by Agents of Foreign Liquor Dealers—Regulation.**—While the power exists in the State to regulate the business of soliciting proposals to purchase intoxicating liquors by agents of foreign liquor dealers, this State as yet has not legislated on this subject. (See 153 Ky., 784).

NAT T. HOWARD, E. N. MAHUGH for appellant.

JAMES GARNETT, Attorney General, CHAS. H. MORRIS, Assistant Attorney General, E. BRADLEY and W. S. HOLMES for appellee.

RESPONSE TO PETITION FOR REHEARING BY JUDGE CARROLL—Overruling Petition.

So much of the opinion in this case, which is reported in 153 Ky., 784, as indicates that the state is without power to punish agents of non-resident liquor dealers who solicit orders in this state, is withdrawn. The state, under the authority of *Delamater v. South Dakota*, 205 U. S., 96, 51 L. Ed., 728, has power to regulate the business of soliciting proposals to purchase intoxicating liquors by agents of foreign liquor dealers, but as yet has not legislated on this subject.

The petition is overruled.

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**Brewer v. Brewer, et al.**

(Decided September 17, 1913).

**Appeal from Todd Circuit Court**

1. **Verdict—Wills.**—The verdict of a jury sustaining a will will not be set aside as against the evidence, where it is not palpably contrary to the evidence.
2. **Instructions—Wills—Insane Delusion.**—An instruction on insane delusion on the part of the testator about his children was properly refused where the evidence failed to show such delusion on his part.

O'REAR & WILLIAMS and MAX M. HANBERRY for appellant.

S. Y. TRIMBLE, TRIMBLE & BELL and JAS. R. MALLORY for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

W. B. Brewer died a resident of Todd County in the fall of 1908. He executed a will on August 25, 1908, which after his death was probated in the Todd County Court. His oldest son appealed from the order of the county court to the circuit court where the case was tried before a jury who found a verdict in favor of the will; and judgment having been entered upon the verdict, he prosecutes this appeal.

By the will the testator directed that after his debts were paid \$500 of his life insurance policy be used for the erection of a monument over his grave, and that on this monument should be inscribed the offices which he had held in certain orders to which he belonged. He left to his wife, Albertine Brewer, the house and lot on which they resided, the printing office and lot adjoining, in fee simple, in order to repay her for the money she gave him after they married. He also bequeathed to her all the household and kitchen furniture and a horse and buggy. He bequeathed to his son, appellant W. C. Brewer, the sum of \$10, stating that he did this because he had had to spend so much money on him that he thought this was all he was entitled to. He directed that his wife have one-half of all his personal property left after the \$500 was taken out for the monument, including insurance money, lien notes, etc. He devised to his daughter, Bertha B. Wilkins, and his son, Clarence B. Brewer, one half each of the remainder of all his property, real and personal, except his library, and directed that the estate devised to them should be held by a trustee.

The chief complaint made on the appeal is that the verdict is palpably against the evidence. The facts are briefly these: The deceased was about 59 years old; he had been in bad health since about February 1908, suffering from a bladder trouble. In the fall of the year, he suffered a stroke of paralysis which later caused his death. Up to the time he was taken sick he was a man strong physically and mentally. He began life without education and without property, as a shoemaker. He became later in life a self-educated man. At his death he owned a library of about one thousand volumes, and had for a number of years been running a newspaper. He had served as magistrate and post master of the town where he lived; for a number of years he had taken

a leading interest in the graded school of which he was one of the trustees. He was a man of strong convictions and strong character. By his first wife he had three children, the youngest being an infant when she died. By the second and third wives he had no children. The third wife, Albertine Brewer, to whom he was married about the year 1885, survived him. The youngest of the children was about two and one-half years old when they were married; the daughter, Bertha, was about eight, and W. C. Brewer, the oldest son was about twelve years old. The proof for the contestant on the trial was in substance to the effect that their father was unkind and cruel to the children after his third marriage, although he had been very kind and affectionate to them theretofore; and that this was due to the influence of his wife; that he whipped W. C. Brewer unmercifully with a horse whip and cow hide, and treated him cruelly; that he had in fact spent no money on him, and in substance that he entertained an insane delusion as to his son's profligacy and the amount of money which he had spent upon him. On the other hand, the proof for the will by a number of neighbors and friends of the family was to the effect that the third wife treated the children kindly, took good care of them, and that the father was much the same as he had always been; that W. C. Brewer was wild and dissipated; often getting into trouble, and that his father tried in many ways in vain to induce him to reform. We deem it unnecessary to go into the minutiae of the proof. W. C. Brewer admits himself that he did not speak to his father from the year 1895 until his death in 1908, although most of the time he was living in the same town with him. The father was a man of strong likes and dislikes, and while there was sufficient evidence to take the case to the jury, the great weight of the evidence shows that the testator was of sound mind and understood perfectly the will that he had made. There was a little evidence of undue influence, the fact being that W. B. Brewer was at all times the ruling spirit of the household. The will was the result of a settled conviction on his part that this was the just disposition of his estate, a conviction he had entertained for many years before his death, when his health was perfect.

The court gave the jury these instructions:

1. The court instructs the jury that they should find the paper in controversy to be the last will and testament of W. B. Brewer unless the jury believe from the



evidence that said Brewer was of unsound mind at the time of the execution of said paper, or that the execution of said paper was procured by undue influence.

2. If the jury believe from the evidence that W. B. Brewer was not of sound mind at the time of the execution of the paper in controversy, or that said paper was procured by undue influence, they should find said paper not to be the last will and testament of said Brewer.

3. A person is of sound mind in making a will, if at the time of its execution he has such mental capacity as to enable him to know the natural objects of his bounty, his obligations to them, the character and value of his estate and to dispose of it according to a fixed purpose of his own.

4. Undue influence is any influence over the mind of the testator to such an extent as to destroy his free agency and to constrain him to do against his will what he would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated upon his mind at the time he executed the paper. But any reasonable influence obtained by acts of kindness or by appeals to the feelings, or understanding, and not destroying free agency, is not undue influence.

5. The court instructs the jury that if they believe from the evidence that the testator W. B. Brewer at the time he executed the paper in controversy was under an insane delusion as to the conduct of his son, Carl Brewer, in the community or towards the testator or as to the money that he had lost or expended on account of his said son, and that he was of unsound mind on these subjects, or either of them, and that said testator by reason of such unsoundness of mind made a different disposition of his estate from that which he otherwise would have made, then and in that event the jury should find the paper not to be his last will and testament, although said testator was of sound mind on other subjects; but in order to invalidate the paper in controversy on account of the testator's mistake, if any, as to his son's conduct or on account of the testator's mistake, if any, as to the money he had lost or been compelled to expend for his said son, the jury should further believe from the evidence that the testator was insane on this subject and that the paper in controversy was induced by such insanity."

These were all the instructions given. No complaint is made of the first four instructions; but appellant asked

the court to instruct the jury in substance that if at the time of the execution of the paper, the deceased was under an insane delusion as to the conduct of any of his children and was of unsound mind on that subject, the law was as set out in No. 5. The court properly refused this instruction; for there was no evidence of any delusion on his part as to the conduct of his other two children. While there was some evidence that he was rather strict with his children, there was no evidence that he entertained any false views in regard to his daughter or the younger son. The daughter lived with him until she was married, and the younger son was living with him at the time of his death. If the instruction had been given it could have had no effect upon the result of the trial.

Judgment affirmed.

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### **Crawford v. Wiedemann.**

### **Wiedemann v. Crawford.**

(Decided September 17, 1913).

#### **Appeals from Campbell Circuit Court.**

1. Vendor and Purchaser—Which to Pay Taxes.—Section 4023 of the Kentucky Statutes, which provides that if property be sold before February 1st, of the year in which the taxes are due and payable, it shall be the duty of the purchaser, in the absence of any contract to the contrary, to pay the taxes upon the property bought, applies to judicial sales, and embraces all annual taxes, including State, county and municipal taxes.
2. Statutes—Summary Remedy in Ascertainment of Taxes.—Section 989 of the Kentucky Statutes, which authorizes courts having a continuous session, in actions for the sale of real-property, to determine summarily the amount of taxes upon the property to be sold, and to provide for the same in the judgment, or by a credit for such taxes upon the purchase price, is a remedial statute only, and is not inconsistent with or repealed by section 4023 of the Kentucky Statutes, which confers upon the purchaser of real-property the substantive right of having the current taxes upon property bought by him credited upon his purchase price where the sale is made after February 1st, of any year.

JAMES C. WRIGHT for Crawford.

RAMSEY WASHINGTON and DOLLE, TAYLOR & O'DONNELL  
for Wiedemann.

OPINION OF THE COURT BY JUDGE MILLER—Affirming on the first appeal and reversing on the second appeal.

Leonard J. Crawford, the appellant in the first appeal, and appellee in the second appeal, which are heard together, bought the property sold herein by the commissioner on January 24, 1912. The sale to Crawford was confirmed on January 29, 1912. On December 7, 1912, Crawford moved the court to allow him as credits upon his sale bonds (1), the sum of \$411.65, being the amount of the State, County and Court House District taxes upon said property for the year 1912; and (2) the further sum of \$342.65, the latter sum being the tax due on said property to the District of Highlands for the year 1912. Crawford had paid both sums on November 30, 1912. The court overruled the first motion, but sustained the second motion, and allowed the purchaser a credit upon his bond for \$342.65, being the amount that he had paid for the tax due the District of Highlands. Crawford appeals from the order refusing him the credit for \$411.65, while Wiedemann appeals from the order allowing the credit for \$342.65.

The District of Highlands, in Campbell County, has some municipal powers, and exists by virtue of an Act of the Legislature passed in 1872. See Chapter 976, Volume 1, Acts of 1872. By an amendment of 1884, it was provided that assessments of all property in the District for taxation, for district purposes, should be made as of the 1st day of January. Acts 1883-4, Chapter 699. The district tax upon the property bought by Crawford, and for which the court allowed him a credit upon his sale bonds, became a lien upon the property on January 1, 1912, twenty-three days before the property was sold.

Section 4023, of the Kentucky Statutes, reads, in part, as follows:

“The holder of the legal title, and the holder of the equitable title, and the claimant or bailee in possession of the property on the 1st day of September of the year the assessment is made, shall be liable for taxes thereon; but, as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment; \* \* \*

“Provided, that if the property be sold before February 1st of the year in which the taxes are due and payable, then, as between the purchaser and seller, and in the absence of any contract to the contrary, it shall be the

duty of the purchaser of the property to pay the taxes thereon; and if the property is sold after February 1st, of the year in which the taxes are due and payable, it shall be the duty of the seller to pay the taxes thereon."

Section 989 of the Kentucky Statutes, which is found in the division thereof relating to "Courts Having Continuous Session," reads as follows:

"The court may, in actions for sale of real property, determine summarily, with or without written pleadings, the amount of any State, district or municipal taxes or assessment upon the property to be sold, and shall provide for the payment of the same in the judgment; and if the plaintiff fail to ask therefor, the purchaser shall be entitled, at any time before the payment of the purchase price, to a credit for the amount thereof."

Under the provisions of section 4023, if it applies to all taxes, both motions for a credit should have been overruled, since the sale was made before February 1st. In such cases the statute makes it the duty of the purchaser, in the absence of a contract to the contrary, to pay the taxes for the current year.

The ruling of the circuit court in allowing the credit for the District of Highlands tax was evidently based upon the theory that section 4023, *supra*, did not apply to or affect by way of amendment the local Acts of 1872 and 1884, incorporating the District of Highlands and levying taxes therefor, but that said section 4023 did control the rights of the parties as to the State, County, and Court House District taxes levied under a general law.

No contract is relied upon in this case, and we assume the judgment made no provision upon the subject.

Crawford insists that his rights are fixed by section 989 of the Statutes above quoted; while Wiedemann insists that section 989 relates merely to the remedy and confers no substantive rights whatever, and that the substantive rights of the parties are controlled by section 4021 of the Kentucky Statutes, which gives a lien upon property for taxes, and section 4023 above quoted, which fixes the respective rights and duties of the seller and purchaser.

It is further contended by Wiedemann that section 4023 has no application to judicial sales, and that for that reason alone the court should not have allowed Crawford credit for any sum paid as taxes. To so hold, however, would be giving a restricted construction to the

statute, which is not justified by its language. The statute is general in its terms, and fixes the respective rights of the parties, in the absence of a contract, where property is sold after the tax is levied and before February 1st., following. Although section 4023 is found in the chapter on Revenue and Taxation, it is under the sub-head of "General Provisions," which, in effect, constitute a general law upon the subject there treated.

Section 4023 is general in its provisions and applies to all taxes which are "due and payable" in the current year of the sale. If two parties should make a contract of sale on January 1st of any year, without including in their contract any provision as to the payment of the taxes for the current year, the seller could, as a matter of law, require the buyer to pay the taxes for the current year, because the statute expressly so provides. They contracted with the statute in view; and if the buyer had wished to avoid the effect of the statute he should have contracted to that effect. And the law being applicable to all persons in their ordinary contractual relations with each other, we see no reason why it should not equally apply when the rights of the buyer and the seller come to be fixed by a court of equity. The statute is controlling in either case. And, since in the case of a contract between individuals the buyer may contract against his statutory liability for the taxes for the current year, the court, which in a judicial proceeding acts for the parties, may by its judgment provide that the buyer of the property shall pay the taxes thereon, as a part of his purchase price, even though the property be sold before February 1st.

Section 989 of the statute above quoted, is a practice act for circuit courts having a continuous session, and merely provides a summary remedy for the ascertainment and payment of taxes on property sold in tribunals of that character. If it should be treated as giving substantive rights, we would have the anomalous situation of circuit courts of continuous session granting a species of relief that would be denied in other circuit courts. Evidently, no such result was ever contemplated. The substantive rights of the parties in this respect are fixed by section 4023, which, in our opinion, applies to all annual taxes alike. There is nothing in the statute which would make it apply to one character of tax and not to another. It does not attempt to affect the rights of municipalities or to disturb their liens for taxes; it merely

fixes the rights and duties as between the successive owners of the property. It is not at all inconsistent with section 989 which merely provides a summary remedy in courts having a continuous session. The right to the credit is given or denied by section 4023, and in asserting the right in courts having a continuous session the purchaser may proceed summarily under section 989; but if the right is to be asserted in a court which does not have a continuous session the purchaser cannot proceed summarily. The right exists, however, in both courts, if it exists in either.

It follows, therefore, that since the sale in this case was made before February 1, 1912, it was the duty of the purchaser to pay all the taxes for that year, and that the circuit court erred in allowing any credit whatever upon Crawford's purchase bonds.

The judgment in Crawford's appeal is affirmed.

The judgment in Wiedemann's appeal is reversed, with instructions to the circuit court to set aside the order allowing Crawford the credit for \$342.65 upon his purchase bond.

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### **Trosper Coal Company v. Rader.**

(Decided September 17, 1913).

#### **Appeal from Knox Circuit Court.**

1. **Contracts—Action for Breach of—Measure of Damages.**—In an action for a breach of contract by the company to pay 9 cents a ton for all coal in a certain entry, the plaintiff to keep the entry in good condition, a verdict for \$1,518 cannot be sustained in the absence of proof showing definitely the amount of coal to be gotten out, and the reasonable cost to the plaintiff of doing the things he was to do under the contract; as the measure of damages in such an action is what the plaintiff would have received under the contract less the reasonable cost of doing the work.
2. **Contracts—Action for Breach of—Evidence.**—Where the plaintiff sent an agent to another to obtain a contract from him for the plaintiff and his agent jointly, what took place between the agent and the person to whom he was sent, is competent evidence against the plaintiff, and the defendant may also show that this was reported by the agent to the plaintiff and what he said when it was reported to him.
3. **Contracts—Action for Breach of.**—Where the defendant refused to allow the plaintiff to complete his contract, the defendant may

not show what it paid others to carry out the contract without first showing that the prices so paid were reasonable.

4. Instructions—New Trial—Appeal.—Instructions not complained of in the grounds for new trial cannot be considered on appeal, although excepted to at the time they were given.

P. D. BLACK, JAMES D. BLACK and HIRAM H. OWENS for appellant.

J. M. ROBSION for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Reversing.

In the coal mine at Trosper, Kentucky, there is what is called a straight entry. At a point on the left side of the straight entry is a trap door through which one enters what is called the crooked entry. Between these two entries is a pillar. The rooms are worked out from the crooked entry which slopes downward; thus water which accumulated in the head of the crooked entry, ran down in the rooms to such an extent as to interfere with the work. A contract was made between the boss of the mine and C. T. Rader under which, according to Rader's version of it, he was to get the water out, keep it out, and do such work in the entry as the company would have to do in other entries, and in consideration of this, it was agreed that he should have nine cents a ton on the coal mined from this entry, and if he got the coal out himself, he was to get forty-five cents a ton. He brought this suit against the company charging that after he had gotten the water out of the entry, the company had discharged him, and broken its contract. He alleged in substance that there were 30,000 tons of coal left in the pillars and stumps of the entry and 1,000 tons in the wall. On the other hand, according to the version of the contract as shown by the company, he was to be paid nine cents for the coal mined from the rooms, but his contract did not include the coal to be mined from the pillars and stumps. On a trial of the case he recovered a verdict and judgment for \$1,518. The company appeals.

The first question to be determined is, does the evidence offered by him warrant the verdict for \$1,518? The only testimony relating to the quantity of coal which had not been mined at the time of his discharge is given by him. He said, "There were eleven pillars and twenty-two stumps. Some of them were over 300 feet

long and some of them 100 feet. They varied in thickness, some 25 or 30 feet and others 8 or 10 feet thick. The coal was about six feet deep." He was then asked how many tons of coal remained in the mine and answered: "I believe the surveyor estimated it at 30,000 tons." The court excluded this answer. Then these questions and answers occurred: Q. Tell the jury in your own judgment how many tons of coal were in there. A. Well, I expect there was that many there. Q. Of your own judgment now? A. I guess there was that much there. I have no right to dispute it.

These answers show that he was simply stating what the surveyor had told him. He does not profess to have made any measurements himself or to have known any facts from which he could make an estimate. His statements as to the size of the pillars and stumps are too vague to be of any value; for he does not tell us how many were large or how many were small. Such evidence is too uncertain to sustain the verdict for \$1,518.

There is another defect in his testimony. The court properly told the jury that the measure of recovery was the difference between the contract price and the fair and reasonable cost of doing what he was to do under the contract. He does not state any fact from which an intelligent judgment can be formed as to what a reasonable cost of doing the work that he was to do under the contract, would have been, or how long it would have taken to get out the coal referred to. He said: "The contract was for me to have nine cents on every ton of coal that those fellows mined down there, and if I loaded any myself, it was to be forty-five cents. But in the first place this water was to be all got out. So I went ahead and got the water out. I was to keep up the track and keep it in repair. I was not to perform any duties in connection with this entry other than the duties of the company itself toward the mine. I was just to keep it in condition for the miners to get the coal. If I should have a bad place in the entry that should have been my duty to have fixed it. I was just to place myself as the company and to keep it in working condition." What would have been a reasonable cost of doing this, we are left entirely to conjecture, and the verdict, for this reason also, cannot stand.

Rader testified on the trial that the boss told him that he was making too much money, and that he was discharging him for this reason. The company offered to



prove that after Rader quit, they paid other men at the same rate they had been paying him to do the same work. This proof the court properly excluded. The company may show by witnesses what was the fair and reasonable price for doing the things Rader was to do under the contract, but it cannot show what it expended after Rader quit without showing first that such expenditures were reasonable. This it may do.

To show that the contract between Rader and the company did not include the taking out of the pillars, the company introduced Wes Parr, and proved by him that Rader proposed to him that he should go to see the boss and obtain a contract from the boss for Rader and Parr as partners to take out the pillars; that Parr, at Rader's request, did go to see Ross, the mine boss, and that Ross declined to make the contract saying that he had already made a contract with another person. The court declined to allow the company to prove what took place between Parr and Ross or to prove that Parr told Rader what had taken place between him and Ross. As Rader had sent Parr to Ross to get a contract for them two, and Rader was to be a partner with Parr, Parr was Rader's agent in the conversation with Ross, and what was said between Ross and Parr was competent against Rader. It was also competent for the company to prove that Parr reported to Rader what Ross had said and what Rader said to Parr when this was told him.

The instructions of the court not having been complained of in the motion for new trial, no question as to errors in them can be considered on the appeal. But for the reasons indicated the judgment is reversed and the cause remanded for a new trial and further proceedings consistent herewith. On the return of the case to the circuit court, the amended answer will be allowed to be filed.

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**Commonwealth, By, et al. v. Ashland Coal & Iron  
Railway Company.**

(Decided September 17, 1913).

**Appeal from Carter Circuit Court.**

1. **Taxation—Assessment of Omitted Property.**—The "omitted property" contemplated by our assessment statutes is property which

is not assessed at all; they do not mean that property which by mistake has been apportioned to the wrong subdivision or municipality may be treated as omitted "property" by the county or subdivision where it should have been assessed.

2. **Taxation—Assessment of Omitted Property—Remedy.**—In such cases the county or subdivision so wronged may appear before the board authorized to make the assessment and have the error corrected, and if that body refuses it may be required to do so by mandamus.

JEROME DUVALL, G. W. E. WOLFFORD for appellant.

PROCTOR K. MALIN, THEOBALD & THEOBALD for appellee.

OPINION OF THE COURT BY JUDGE TURNER—Affirming.

This is a proceeding by the Auditor's agent of Carter County, seeking to assess for taxation for each of the years 1906, 1907, 1908, 1909 and 1910, 58-100 of a mile of appellee's railroad in that county, and the franchise tax thereon, alleging that the same was omitted from the assessment for each of those years.

The county court granted the relief sought by the Revenue Agent, but upon appeal to the circuit court the proceeding was dismissed, and from that judgment this appeal is prosecuted.

The case was tried on an agreed statement of facts, which in substance is, that the whole of the property of the railroad company was assessed for each of the years mentioned, and the taxes thereon paid; but that by mistake in apportioning the property between the counties of Boyd and Carter there was apportioned to Boyd county this 58-100 of a mile which should have been apportioned to Carter County, and that the taxes on same had been paid to Boyd County.

So the only question is, whether or not the mistake in apportioning this section of railroad to the wrong county makes it "omitted property" in the county where it should have been assessed.

The agreed facts are that the whole of that railroad line was assessed for taxation each of the years named, and that the taxes were paid to the State, and the several counties and districts to which it was apportioned.

The "omitted property" contemplated by our Assessment Statutes is property which is not assessed at all; they do not mean that property which by mistake has been apportioned to the wrong sub-division or municipality may be treated as "omitted property" by the

county or sub-division where it should have been assessed.

There is a very simple and efficient remedy afforded in such cases; the county or sub-division so wronged may appear before the board authorized to make the assessment and have the error corrected, and if that body refuses it may be required to do so by mandamus. Commonwealth v. C. & O., 28 R., 1201; Commonwealth v. M. & B. & S., 28 R., 1332; C. & O. v. Turnpike Co., 31 R., 1163.

Judgment affirmed, Judge Hannah not sitting.

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**Chicago, St. Louis & New Orleans Railroad Company,  
et al. v. Benedict's Administrator.**

(Decided September 17, 1913).

**Appeal from Hickman Circuit Court.**

1. Carriers—Passengers.—One riding on a train with the knowledge and consent of the conductor is a passenger.
2. Evidence—Witness.—Where the conductor of a train denies that plaintiff's decedent was riding on a train with his knowledge and consent, evidence of a statement by him showing the contrary is admissible for the purpose of impeaching him.
3. Evidence—Record—Oral Evidence.—Where defendant is notified to produce a record and fails to do so, oral evidence of its contents is admissible if the record itself is admissible.
4. Evidence—Record.—A written report by an engineer handling an engine just before an accident, to the effect that the engine was defective, and filed in the round house is competent on the question of notice.
5. Instructions.—An instruction which fails to define an emergency in which plaintiff may act as one created by the negligence of the defendant is not prejudicial where no other emergency existed.
6. Verdict—Excessive.—Facts considered, and verdict of \$12,500 held not excessive.

BENNETT, ROBBINS & THOMAS, C. L. SIVLEY, TRABUE,  
DOOLAN & COX and R. G. ROBBINS for appellants.

R. L. SMITH for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COM-  
MISSIONER—Affirming.

John Benedict, while riding in the caboose of a local freight train owned and operated by the Illinois Central Railroad Company, lessee of the Chicago, St. Louis & New Orleans Railroad Company, was killed by a collision

between that train and a train approaching from the rear. His administrator brought this action against the two companies to recover damages for his death. The trial resulted in a verdict and judgment in his favor for \$12,500. The railroad companies appeal.

The accident occurred on March 14, 1912, a few miles south of Clinton. The decedent, John Benedict, a young man about 25 years of age, was riding in the caboose of a local freight train. This freight train was standing near a trestle, and had just started on its journey when another freight train ran into it from the rear. Without giving the evidence in detail, it is sufficient to say that it not only shows that the engine of the rear freight train was in a defective condition, but that the engineer and fireman disregarded two or three signals indicating the presence of the other train immediately in their front. There was also evidence tending to show that the front train was not properly protected by the flagman. Indeed, if the weight of the evidence is to be believed, it presents a case of inexcusable negligence.

In addition to the question of negligence on the part of the defendants, two other questions are presented: (1) Was the decedent a passenger at the time of the accident? and (2) Was he guilty of contributory negligence?

Upon the first question the evidence is to the effect that he was in the caboose in company with another passenger, and in company with the conductor and the other trainmen. The conductor admits that he reported the decedent as a passenger, and that he swore in the examination before the superintendent that decedent paid him a fare of 42 cents. This evidence was admitted without objection. We think the evidence sufficient to show that the decedent was on the train with the knowledge and consent of the conductor, and if so, he was a passenger. This conclusion does not conflict with the rule laid down in *L. & N. R. R. Co. v. Webb*, 99 Ky., 332. There the court held that the presence of the boy in the caboose with the knowledge of the conductor did not constitute him a passenger, because it was not the duty of the conductor to put the boy off before reaching the next stopping place. In the case under consideration, however, the train on which the decedent was riding stopped for several minutes just before the collision. If decedent was on his train without his consent the conductor could easily have put him off at that point.

During the progress of the conductor's examination he denied that the boy was on the train with his knowledge and consent. He was then asked if he had not told plaintiff, Mr. Benedict, on the Sunday after the accident near Ernest Reed's store that John was on his way to Fulton that day to get a job as flagman, and that he (conductor) was trying to help him get that job, and was taking him to Fulton that day for that purpose. The conductor denied making the statement, and the evidence was received without objection. Later on plaintiff, Benedict, was called and testified that the witness, at the time and place, made such a statement to him. This testimony was objected to, and it is earnestly insisted that the court erred in permitting it to go to the jury. It is true, as argued by counsel for defendants, that the statement is not a part of the *res gestae*. It is equally true that it is the general rule that admissions or declarations of an agent made after the completion of the transaction are not admissible against the principal, but in the present case the question was: Was decedent on the train with the knowledge and consent of the conductor? The conductor repeatedly stated that the decedent was not on the train with his knowledge and consent. Whether or not he was there with his knowledge and consent was not a collateral fact, but one of the main facts in issue. Having denied knowledge and consent, it was competent to show statements to the contrary for the purpose of impeachment. The evidence complained of was of this character, and the court admonished the jury that the admitted evidence was not substantive evidence and had no bearing on the merits of the case, but that the jury should consider it only as affecting the credibility of the conductor. With this admonition the evidence was clearly admissible.

While the engineer in charge of the colliding engine was on the stand, he stated that the air pumps of that engine were defective. He was asked if he had notice of the condition of the air pumps. He stated that he had, and was then asked where he got the notice. He stated that he had gotten it from a report made by the engineer handling the engine just before the accident, and filed in the round-house at Mounds, Illinois. The further question was asked: "What did that report state with reference to that engine?" Over the objections of the defendants, the witness was permitted to state that the air pump was in a bad condition, and did not make

enough air to supply the train. In this connection it is insisted that there was a failure to show that the record in question was made in the regular course of business, and a failure to introduce the person making the record. It is also insisted that it was not proper to introduce secondary evidence of the record. In answer to the last objection the record discloses the fact that several days prior to the trial a written notice was served on the defendants asking them to produce the record in question, and a rule was also asked requiring them to do so. The defendants failed to produce the record. If, then, the record was competent at all, oral evidence of its contents was certainly admissible. We do not think that the record in question is to be considered in the same light as entries in books. One of the material questions in the case was: Was the engine in a defective condition, and if so, was this condition known to the defendants and their agents, or could it have been known by them by the exercise of ordinary care? We think the evidence was competent as bearing on the question of notice. It is true that after the report was filed, the engine could have been repaired. This fact, however, does not render such evidence inadmissible. Having shown that the engine was in a defective condition, and that this fact was brought home to the defendants and their agents, the defendants could still show that the engine was repaired and that the alleged defective condition did not exist at the time of the accident.

Complaint is made of the instructions because it is alleged that they assume that decedent was a passenger. While the instructions may be subject to verbal criticism, we conclude that defendants' complaint in this respect is without merit. Fairly considered, the instructions leave no doubt that one of the issues to be passed on by the jury was whether or not decedent was a passenger at the time of the accident.

Another complaint of the instructions is based on the following addition to the instruction on contributory negligence:

"Unless you further believe from the evidence that, at the time decedent remained in the caboose, an emergency existed and the decedent made choice of means used and in making said choice, used what appeared to him, under the circumstances surrounding him at said time, to be the safest means of escape and exercised

ordinary care in making said choice, then the plaintiff would be entitled to recover, even though his choice was not the best and amounted to negligence and carelessness as set out hereinbefore."

It is argued that this part of the instruction is erroneous in that it does not require the emergency under which decedent was excused from contributory negligence to have been brought about or produced by the negligence of the defendants in any manner whatever. It must be remembered, however, that in the case under consideration the only emergency that existed was created by the defendants. One of its trains was approaching another train from the rear. A collision was inevitable. The failure, therefore, to define the emergency as one created by the negligence of the defendants could not have been prejudicial.

Lastly, it is insisted that the verdict of \$12,500 is excessive. The evidence shows that decedent was about 25 years of age, and had an expectancy of about 32 years. It further appears that he was able to make, when he was at work, from a dollar to a dollar and a half a day. While the verdict is large, we cannot say that it is in excess of decedent's earning power. We cannot assume that a young man's earning power will always remain the same. Calculations, therefore, based on his earning capacity at the time of his death are by no means conclusive. His earning capacity may increase, and frequently does. The test is: What sum will compensate his estate for the destruction of his power to earn money? In each case this is a question for the jury, with the settled policy on the part of the court not to interfere with its verdict unless the sum be so large as to strike us at first blush as being the result of prejudice or passion. Applying this rule in this case, we cannot say that a verdict of \$12,500 is excessive.

Judgment affirmed.

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### Hunt, et al. v. Hunt, et al.

(Decided September 18, 1913).

#### Appeal from Pike Circuit Court.

**Deeds—Construction of.**—In the construction of deeds, the effort of the court always is to get at the intention of the parties, and if

the intention can be arrived at, although it may be out of touch with some expressions in or parts of the instrument, it will have a controlling influence in its interpretation. In construing a deed made by a father to the husband of his daughter and her heirs and assigns, coupled with the provision that the children of his daughter by a former marriage should share equally in the land with her other heirs, it is held that the grantee took a life estate with remainder to the children of his wife.

R. H. COOPER, J. M. ROBERSON, STRATTON & STEPHENSON and C. M. WHITT for appellants.

ROSCOE VANOVER, YORK & JOHNSON and HAGER & STEWART for appellees.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

The only question in this case is the proper construction of the following deed:

"This indenture made and entered into this 28th day of July, 1869, by and between Jesse Phillips and Nancy Phillips, his wife, of the county of Pike and State of Kentucky, of the first part, and Harrison Fields, of the county and State aforesaid, of the second part:

"Witnesseth: That the party of the first part, for and in consideration of the love and affection they have for their daughter, Tabitha J. Fields, and the sum of five dollars, to us in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, aliened, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, convey and confirm unto Harrison Fields, the party of the second part, his heirs and assigns forever; also his wife's two first children shall be equal heirs with her other heirs; the party of the first part shall use the lands about to be conveyed for grazing lands; a certain tract or boundary of land on Johns Creek and bounded as follows: \* \* \*

"To have and to hold the same with all the appurtenances thereon to Harrison Fields, the party of the second part, his heirs and assigns forever, with covenant to warrant and defend against his heirs, assigns, executors and administrators."

Tabitha Jane Fields, the wife of Harrison Fields, had, at the time of the execution of the deed, two living children, the issue of a former marriage, and one child, the issue of her marriage with Fields. One of the children of the first marriage married Frank Hunt, and afterwards died, leaving surviving her five children, who



after the death of Harrison Fields brought this suit, asserting that they were entitled to an undivided one-third interest in the tract of land described in the deed.

The lower court, as appears from the briefs of counsel, was of the opinion that Harrison Fields took a fee in the land described in the deed, and dismissed the petition of the plaintiffs, who thereupon prosecuted this appeal.

It is argued in their behalf that it was the intention of Jesse Phillips and his wife, grantors in the deed, to convey the land to Harrison Fields for the use and benefit of himself and wife for life, with remainder to all of the children of his wife; or, if not, that it was their intention to convey the land to Fields, to be held by him in trust for the children. As illustrating that it was the intention of the parties to the deed that the three children of Mrs. Fields should each receive one-third of the land described in the deed, it is averred in the petition, to which a demurrer was sustained, that in 1896 Harrison Fields and his wife, without any valuable consideration, conveyed one-third of the land described in the deed to Sarah King, one of the children of Tabitha Jane Fields by her first marriage, and to Catherine Hardin, the only child of her marriage with Harrison Fields, one-third of the land.

If Harrison Fields, as held by the lower court, took the fee in the land, the appellants, who are children of the only other daughter of Mrs. Fields by her first marriage, will not receive any part of the land, as Harrison Fields died some time ago, intestate, and at his death his daughter took by inheritance the remaining one-third, subject to the dower interest of her mother, and she will thereby come into the possession of two-thirds of the land.

The purpose of the grantors is not well expressed, but it is manifest that they intended that the children of their daughter by her first marriage should have an interest in and share equally in the estate with the children of Harrison Fields. Some meaning should be attached to the words "also his wife's two first children shall be equal with her other heirs," but if it should be adjudged that Harrison Fields took the fee in the land, these words would have no effective meaning, as Harrison Fields could have conveyed the land and thereby deprived the children of the first marriage of any interest in it, or if he died intestate, as he did do, the chil-

dren of the first marriage would not inherit any part of it. It is, therefore, plain that to adjudge the fee in Harrison Fields would defeat the expressed intention of the grantors that the children of Mrs. Fields by her first marriage should have an interest in the estate. It is also quite evident that the draftsman of the deed did not have any technical knowledge of how a deed should be written or understand the legal difference between the words "heirs" and "children" when used in instruments like this; but we think the word "heirs" should be construed to mean "children" and the deed interpreted as if it read in substance that the land was conveyed to Harrison Fields, with remainder to all the children of his wife.

It is very true that some parts of the deed if construed according to the usual rules would lead to the conclusion that Harrison Fields took the fee, but when looked at as a whole this construction would ignore the express declaration that the children of his daughter by her first husband should share equally with the other heirs in the estate; and that the parties understood that the children of the daughter both by her first and second marriage were to come into possession of the land, is indicated by the conveyances made by Harrison Fields to two of them, to which conveyances we may turn as aids in getting at what was intended. There is no escape from the conclusion that the grantors intended that the children of Mrs. Fields by her first marriage should have an interest in this land, and this prominent purpose of the grantors should not be entirely disregarded, as it would be by holding that Harrison Fields took the fee, nor should the awkward manner in which the parties gave expression to their intention be permitted to overthrow it.

In the construction of deeds the effort of the court always is to get at the intention of the parties, and if the intention can be arrived at, although it may be out of touch with some expressions in or parts of the instrument, it will have a controlling influence in its interpretation; and it being clear to our minds that the grantors intended to make certain provision for the children of their daughter, we are not inclined to adopt a construction that would defeat this purpose.

Under all the circumstances we think that Harrison Fields took a life estate, with remainder to the children

of his wife, the daughter of the grantors, and, therefore, the appellants are entitled to one-third of the land.

Wherefore, the judgment is reversed, with directions to enter a judgment in conformity with this opinion.

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## **Jellico Coal Mining Company v. Woods.**

(Decided September 18, 1913).

### **Appeal from Whitley Circuit Court.**

**Mines and Mining.**—It is the duty of mine owners to exercise ordinary care to keep the entries used by the miners in reasonably safe condition, and if a miner, while in the line of his employment, is injured by the failure of the owner to perform this duty, he may recover damages.

**TYE & SILER** for appellant.

**R. L. POPE** for appellee.

### **OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

In this action to recover damages for personal injuries, the appellee had a judgment in his favor for \$350 against the appellant company. A reversal of the judgment is asked for alleged error of the lower court in failing to direct a verdict in its favor and in giving erroneous instructions.

Briefly the facts are these: The appellee was employed as a miner, and after loading his cars with coal in the room where he was at work, he went into the adjacent entry for the purpose of going to the place where the driver was, so that he might notify him that his cars were loaded and ready to be taken out, and while walking through the entry on this business he was caught and injured by slate that fell from the roof of the entry.

The right to recover damages was put upon the ground that the company negligently permitted the roof of the entry to be and remain in an unsafe condition. A peremptory instruction was asked by the company upon the theory that appellee was not injured while in its service or performing any duty that he owed to it, but while he was going on an errand that concerned him alone and one that was outside the scope of his duties and the line of his employment, and, therefore, it was

under no duty to keep the entry in a reasonably safe condition so far as he was concerned, and not liable in damages for the injury that happened to him; and upon the further ground that there was no evidence of negligence on the part of the company.

The evidence shows that appellee had been directed to and was in the habit of notifying the driver when his cars were loaded, so that he might take them out and bring him empty cars, and accordingly appellee, in going through the entry for the purpose of notifying the driver, was acting in the line of his service and the company was under a duty to exercise ordinary care to keep the entry through which he was going in a reasonably safe condition.

It is further said that there is no evidence to show that the company failed to exercise the required care in looking after the safety of the entry, but there is evidence that the mine foreman, whose duty it was to inspect the entry, had not been in the entry where appellee was injured on the day of the injury or the preceeding day, and a witness whose duty it was to prop the entry testifies that he told the mine foreman about the time of the injury that the entry at the place where the roof fell ought to be timbered, and that the mine foreman replied that they did not intend to timber the cross entries and were going to try to get the coal out without doing it. This witness further testifies that when he went to repair the roof after appellee was injured he found two or three hundred feet of the roof in such condition that it had to be repaired or made safe. This evidence was sufficient to show that the company did not exercise ordinary care to keep the entry in a reasonably safe condition.

The instructions, although criticized by counsel for appellant, fairly submitted to the jury the law of the case as we understand it. They told the jury in substance that it was the duty of the company to exercise ordinary care to keep and maintain the entry in a reasonably safe condition, and that if it failed so to do and appellee was injured as a direct result of such failure, they should find for appellee such a sum in damages as would compensate him for pain and suffering and the loss of his powers to earn money. They were further told that it was the duty of appellee to exercise ordinary care for his own safety, and that if the failure on his part to exercise such care brought about the injuries

complained of, the company was not liable. It is further suggested that the verdict is excessive, but there is no merit in this contention.

The judgment is affirmed.

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### **Short, et al. v. Commonwealth.**

(Decided September 18, 1913).

#### **'Appeal from Knott Circuit Court.**

**Venue—Limitation—Local Option.**—To sustain a conviction for selling liquor in violation of law there should be some evidence that the offense was committed in the county in which the indictment was found and within one year before the finding of the indictment.

STEWART & BAILEY for appellants.

JAMES GARNETT, Attorney General, OVERTON S. HOGAN, Assistant Attorney General for appellee.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

There is no evidence even tending to show that the offense charged of selling liquor in Knott County was committed in that county or that it was committed within one year next before the finding of the indictment, and so the motion for a new trial should have been granted and a new trial ordered.

Judgment reversed.

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### **Dickerson v. Wm. Goocey, County Judge.**

(Decided September 18, 1913).

#### **Appeal from Lee Circuit Court.**

1. **Land—Condemnation Proceeding—County Court Without Jurisdiction to Try Title.**—In a proceeding in the county court to condemn land for a railroad right of way, answer having been filed by each claimant asserting sole ownership in the land, and denying title in the other, and a jury had assessed the damages for the right of way, the county court undertook to determine the rights of the adverse claimants of the land to the fund and to dispose of it as those rights might appear to that court, when ap-

pellant filed in the circuit court a petition for a writ prohibiting the county court from trying the issue as to title, and asking a transfer of the action to the circuit court. Held, the county court being without jurisdiction to try the question of title, the writ should have been granted, and it was error to sustain a demurrer to the petition.

2. **Land—County Court Without Jurisdiction to Try Title—Transfer to Circuit Court.**—Except in the matter of land partition and condemnation the statutes confer no jurisdiction upon the county court that relates directly to land, and in partition and condemnation it is clear that the county court jurisdiction does not go to the title of the land involved. Upon motion of either party the county court should have transferred to the circuit court this cause when the damages were assessed in order that the circuit court might try the question of title and dispose of the fund accordingly.

**THEO. B. BLAKEY** for appellant.

**SAM HURST, H. L. WHEELER, G. W. GOURLEY and J. F. SUTTON** for appellee.

#### **OPINION OF THE COURT BY JUDGE NUNN—Reversing.**

This action had its beginning in a condemnation proceeding instituted by the Louisville & Nashville Railroad in the Lee County Court to procure a railroad right of way. The proposed line ran through a tract of land to which the appellant and the heirs of one Sewell each made claim adverse to the other. All the claimants were parties to the condemnation proceeding in the county court, and served with summons. Answer was filed by each claimant asserting sole ownership of the land, and denying any title thereto in the other. In due course a jury assessed the damages for the right of way at \$650. There is no complaint as to the amount of the damages, or the regularity of the proceedings to this point. But when the county court undertook to determine the rights of the adverse claimants to the fund assessed as damages, and to dispose of it as those rights might appear to that court, the appellant, Dickerson, filed in the Lee Circuit Court a petition for a writ prohibiting the appellee, as judge of the county court, from proceeding to try the issue between the claimants as to which the damages belonged. The petition further prayed that the appellee be directed to transfer to the circuit court the case and all the papers relating to it. Appellee demurred to this petition, and it was sustained by the lower court.

The rightful claimant to this fund can not be determined without making inquiry into the land title; that is, it is necessary to try the issue as to ownership of the land in order to make any disposition of the fund. The question is, therefore, presented of the jurisdiction of the county court to try the issue of title to the land. If the county court has such jurisdiction the lower court properly sustained the demurrer, and the remedy for the party aggrieved is by appeal. If the county court is without jurisdiction the writ of prohibition should be granted.

The county and quarterly courts, presided over by the same judge, are of limited jurisdiction, and are confined to matters in which it has been conferred by statute.

Section 1052 of the Kentucky Statutes expressly provides that in any action in the quarterly court "the title to any real estate involved therein shall not be affected thereby." This section also provides that if the title to real estate becomes involved during the pendency of an action in the quarterly court it shall be the duty of the court on motion of either party to transfer the cause to the circuit court.

Except in the matter of land partition and condemnation the statutes confer no jurisdiction upon the county court that relates directly to land, and in partition and condemnation it is clear that the county court jurisdiction does not go to the title of the land involved. Section 499, of the Civil Code, gives to the circuit and county courts concurrent jurisdiction of actions for partition of land, and governs the practice in such cases, but by sub-sections 10 and 11 of section 499, of the Code, provision is made for their transfer to the circuit court for trial in the event the rights claimed to the land are contested in the county court.

Rights of way for railroad purposes secured by condemnation are easements merely, and except for the easement the title remains in the land owner. Sections 835 to 840 of the Kentucky Statutes, inclusive, prescribes the means whereby this easement or right of way may be condemned over private property and put to public use in the shortest time possible, consistent with, and saving the rights of the owners. By these statutes jurisdiction is conferred upon the county court to condemn the right of way for public use, and assess the damages the owner or owners thereof may be entitled to receive.

While these statutes make no provision for a transfer from the county to the circuit court for trial of issues of title that may arise between rival claimants as an incident, yet they do not even by inference confer upon the county court jurisdiction to try them. Since the county court can exercise no jurisdiction other than that conferred by statute it is clear that when the appellee, as county judge, was proceeding, as his demurrer and brief admits, to dispose of the damages assessed by trying the right of claimants to the land, he was exceeding his jurisdiction.

The Lee Circuit Court has exclusive jurisdiction to try that question. Section 966, of the Kentucky Statutes, confers upon circuit courts "original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal, and shall have jurisdiction in all cases where the title to land is in question." That this jurisdiction of the circuit court is exclusive is recognized by the cases of *Craig v. Garnett*, 9 Bush, 97, and *Bush v. Williams*, 6 Bush, 405. Quoting from the 9 Bush case, *supra*, we have this language, "\* \* \* Circuit Courts have jurisdiction in all actions except where exclusive jurisdiction is given to other courts, it results that the circuit courts must have jurisdiction where the remedy sought necessarily affects the title to land, because of the exclusion of that remedy from the inferior courts." The case of *Hunt v. Phillips*, 105 S. W., 445, is to the same effect, and this language is used, "It is not the purpose of the statute that questions of title shall be settled by the county court."

Reasons of analogy, as well as section 499, of the Code, require that upon motion of either party, or upon his own motion the county court should have transferred to the circuit court this cause when the damages were assessed in order that the circuit court might try the question of title and dispose of the fund accordingly.

In reaching these conclusions we have not been unmindful of the force of appellee's argument that since the county judge had unquestioned jurisdiction of the subject matter, it was his duty to try all issues arising in the litigation. The jurisdiction of the county court to condemn the right of way and assess the damages is unquestioned, but it has no semblance of jurisdiction to try an issue in which the title to land is so directly involved as this.



Entertaining these views, the judgment of the lower court is reversed, and the cause remanded, with directions to issue the writ.

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**Bell v. Commonwealth.**

(Decided September 18, 1913).

**Appeal from Pendleton Circuit Court.**

**Appeal—Failure to Brief—Record Examined in This Case and Affirmed Notwithstanding Failure to Brief.**—Where a case is submitted on a motion to dismiss for want of prosecution, and an examination of the record fails to disclose a reversible error, the judgment will be affirmed.

J. T. SIMON for appellant.

JAMES GARNETT, Attorney General, O. S. HOGAN, Assistant Attorney General for appellee.

**OPINION OF THE COURT BY JUDGE NUNN—Affirming.**

Appellant has failed to file a brief in this case, and appellee moves to dismiss it for that reason. The case is submitted on that motion.

We have, however, examined the record, but do not find any reversible error.

The judgment of the circuit court is, therefore, affirmed.

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**Peters v. Commonwealth.**

(Decided September 18, 1913).

**Appeal from Madison Circuit Court.**

**Criminal Law—Intoxicating Liquors—Local Option Law—Violation—Evidence—Sufficiency.**—On a prosecution for the offense of having in one's possession spirituous, vinous or malt liquors for the purpose of sale in local option territory, evidence examined and held sufficient to sustain a conviction.

JOHN C. CHENAULT and D. M. CHENAULT for appellant.

JAMES GARNETT, Attorney General, and O. S. HOGAN, Assistant Attorney General for appellee.

## OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Affirming.

Appellant, Mike Peters, was arrested on a warrant issued by the police judge of Richmond, charging him with having in his possession in Richmond, Kentucky, local option territory, whiskey for the purpose of selling same. On the trial in the police court the jury found him guilty and fixed his punishment at a fine of \$50 and ten days in jail. From that judgment he appealed to the Madison Circuit Court. The jury there found him guilty and fixed his punishment at a fine of \$100 and 50 days in jail. From the judgment entered on the verdict this appeal is prosecuted.

The evidence heard at the trial is, in substance, as follows:

J. H. Allman, an officer of the city of Richmond, testified that he had received information that Amos Woolrey had gotten off the train at Red House with some whiskey. He and two of his deputies went out the Red House pike to the railroad crossing, a point within the city limits of Richmond. In a short time Peters and Woolrey came along in a buggy. He stopped them and asked if they had any whiskey. Peters said they had none, but when they went to search the buggy Peters admitted they had whiskey.

J. D. Dykes testified that he was with Allman when the arrest was made. He heard Peters say he had no whiskey, and heard Woolrey say "Yes, we have whiskey."

It was admitted that Richmond was local option territory.

Appellant, Peters, testified that on the 8th or 9th of May he heard Amos Woolrey say he was going to Winchester. Told him he wanted him to bring four quarts of Old Elk. He said he would not bring it to Richmond, but that if witness would meet him at Red House he would. Witness gave him the money and went down to Red House where Woolrey gave him the four quarts. Witness got it for his own use and did not intend to sell it. Told Allman and Dykes he did not have any whiskey for them. He hired a horse and buggy and drove six miles to meet Woolrey and get the four quarts of whiskey.

Amos Woolrey testified that on May court day last he saw his brother-in-law, who resided on Red Lick in Madison County. They agreed that he should go to his

brother-in-law's home for the purpose of going fishing. His brother-in-law asked him to bring something to drink, and he promised him to do so. His brother-in-law wanted a gallon for himself. Witness arranged to go to Winchester, and mentioned the fact in the business house of Peters. Peters asked him to bring four quarts of Old Elk. Told Peters he would not bring any whiskey to Richmond, but that if he would meet him at Red House he would bring it. Peters agreed to meet him. Witness went to Winchester and got for himself eight quarts of Old Tar and four quarts of Kentucky Pride. He bought for Mr. Peters four quarts of Old Elk. When he reached Red House he delivered the four quarts to Peters and got in the buggy with him. They were arrested as soon as they got in town. Witness did not expect to stop in town. He lived in the country east of Richmond. Peters agreed to carry him home in the vehicle in which he met him.

It is earnestly insisted that the foregoing evidence is wholly insufficient to sustain a conviction. In this connection it is argued that the defendant himself swears that he purchased the whiskey for his own use, and that there is not a single circumstance to show the contrary. The further point is made that the expense of the horse and buggy would more than offset any profit that he could have made on the whiskey. It must be remembered, however, that in determining the purpose of the defendant in a case like this the jury are not confined to his testimony alone, but have a right to take into consideration all the facts and circumstances surrounding the transaction. It must be admitted that defendant's companion purchased a quantity of whiskey far in excess of even the extraordinary demands of an exceedingly dry fisherman. He was not willing to deliver the four quarts to the defendant, but required the defendant to drive six miles in the country to get the whiskey, and to agree to carry him to his home out in the county. While it may be true that the legitimate profit on a sale of four quarts of whiskey would not have been greater than the hire of a horse and buggy, yet those engaged in "boot-legging" are not content with the ordinary profit, but frequently charge two and three prices for the whiskey which they sell. When we take into consideration the quantity of whiskey involved, the secrecy attending the transaction, the trouble and expense which the defendant was willing to undergo in order to secure

the whiskey, and the fact that when arrested he denied having the whiskey in his possession, we conclude that these circumstances are sufficient to justify the conclusion on the part of the jury that he had the whiskey in question in his possession for the purpose of sale in the city of Richmond.

There being sufficient evidence to sustain the verdict, and the instructions not being subject to complaint, it follows that the judgment should be affirmed, and it is so ordered.

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### **Thornton v. Thornton.**

(Decided September 18, 1913.)

#### **Appeal from Marion Circuit Court.**

1. **Arbitration and Award—Setting Aside Award.**—It is the tendency of the courts to uphold awards upon sound principles of public policy; but one cannot be sanctioned that was rendered in a proceeding where one party has had no opportunity to controvert the evidence of his adversary taken in his absence and transcribed by a partisan and relative of the other party, and especially where the award is principally based on that evidence.
2. **Arbitration and Award—Setting Aside Award Made Without Notice and by Sole Arbitrator.**—A sole arbitrator should not be permitted to make an award based upon evidence taken without notice to the party against whom it was used.

O'REAR & WILLIAMS and H. P. COOPER for appellant.

JOHN McCHORD and C. C. BOLDRICK for appellee.

#### **OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

This is a common law action by appellee, asking a judgment on an award; the answer of the defendant seeks to have the award set aside upon the ground that the arbitrator undertook to pass upon things which were not submitted in the articles of agreement; and upon the further ground that at two out of the three meetings held by the arbitrator he had no opportunity to be present or to be heard, and at such meetings he had no representative present, and that appellee presented claims at such meetings of which he had never had notice until after the award was made, and that at one of the said meetings depositions of two witnesses were taken, which

fact he did not know until after the award; that the award was principally based upon the evidence of these two witnesses which was taken at a secret meeting of which he had no notice, and that he had no opportunity to cross-examine either of them, and in effect pleads that for these reasons the award was procured by fraud.

The article of agreement is as follows, to-wit: "THIS AGREEMENT OF ARBITRATION this day entered into by and between W. A. Thornton party of the first part, and G. K. Thornton party of the second part,

"Witnesseth: That whereas there is a controversy and disagreement between the parties of the first and second part in relation to the adjustment and settlement of the accounts of said parties and their respective services in raising a crop of about fifteen acres of tobacco by said parties on the farm of T. H. Thornton in Marion County about the year 1896 and also for work claimed to be performed by the second party for the first party in the tobacco transaction and also for other work in the year 1896 and 1897.

"It is now hereby agreed by the parties hereto that Prentice Weatherford shall hear the entire evidence in relation to all questions touching the raising, handling and sale of said tobacco and work by said Geo. K. Thornton that may be offered by either party and from said evidence return his award in writing to each of the parties hereto.

"Each of the undersigned parties agree to abide by the award of said Prentice Weatherford adjusting the matters hereinabove mentioned.

"Given under our hands this December 21, 1911."

The award is as follows: "The within matter having been submitted to me to adjust and settle between the parties herein named, I did on the 14th day of March, 1912, call the parties together at Bradfordsville, Ky., and after fully considering and calculating on all papers, accounts and evidence submitted by the parties, decide that the following amounts were due and payable to G. K. Thornton from W. A. Thornton at the dates given for each amount, viz.:

On the sale of tobacco crop, February 15, 1899 .....	\$100.00
For work for self and team, year 1896 .....	297.25
For work for self and team, year 1897 .....	64.50
For articles sold W. A. Thornton, 1897 .....	19.75

And that the said G. K. Thornton should have credit for said amounts at same dates on any claim or claims

that said W. A. Thornton held against him at said dates or that he be allowed interest on these amounts to the date of this settlement."

The judgment of the circuit court upheld the award throughout except as to the item of \$19.75, which was disallowed, and from that judgment this appeal is prosecuted.

Appellant testified that at the time the articles of agreement were entered into that there was an agreement between him and appellee that the meetings of arbitration were at no time to interfere with some important business engagements which might at any time call appellant away from home, and this is substantially admitted by appellee. The first meeting was held on the third day of January, 1912, at which time the statements of both appellant and appellee were heard, but the matter was not concluded because appellant was compelled to leave home on business. At the time of or before the first meeting there seems to have been some sort of understanding or agreement between the parties by which Breeding was to be present at the arbitration upon behalf of appellee, and Newbolt upon behalf of appellant, and they were each present at the first meeting.

At the conclusion of the first meeting there was a tentative agreement by which the parties were again to meet on the first day of March; but, a day or two before the first day of March the arbitrator was notified, as he states, over the telephone that appellant had been called to Louisville on important business, and could not be present at that time; but notwithstanding this notice and in violation of the agreement between these two brothers that the arbitration meetings were at no time to interfere with appellant's important business engagements, he proceeded to hold the meeting, and to take the depositions of two witnesses, in absence of appellant or any representative of his; for it appears that even his friend, Newbolt, was not present and had had no notice of this meeting, but that in his stead one Avritt, an uncle of appellee's wife was there, and actually took down in writing the statements of the two witnesses introduced by appellee. Appellant testifies that he never knew of these depositions, or of the fact that they had been taken, until after the award had been made, and this evidence of his is uncontradicted.

At the last meeting, on the 14th day of March, neither appellant nor appellee were present, they having been

notified by the arbitrator that he did not desire their presence; but appellant when asked by the arbitrator if he had any further evidence to offer, being in ignorance of the fact that these two depositions had been taken, bearing upon the claims of appellee, which he says had not been mentioned in the first meeting, and thinking that only his own and his brother's statement given in the first meeting were to be considered, told the arbitrator that he had nothing further to offer.

At the meeting on that day we find again the uncle of appellee's wife aiding the arbitrator, and actually writing or copying the award, and Breeding, the other representative of appellee, also present, and no representative of appellant.

It is the tendency of the courts to uphold awards upon sound principles of public policy; but we cannot sanction one rendered in such an *ex parte* proceeding where one party has had no opportunity to controvert the evidence of his adversary taken in his absence and transcribed by a partisan and relative of the other party, and especially where the award is principally based on that evidence.

He not only had no opportunity to cross-examine these witnesses, but he had none to controvert their testimony by others, for the fact that their evidence had been taken was concealed from him until after the award.

The courts will look with suspicion upon an award based on *ex parte* evidence, and particularly where that evidence is used to substantiate claims which one party to the arbitration did not know were being asserted against him.

In *Cravens v. Estis*, 144 Ky., 511, it was held that one arbitrator and an umpire were without authority to make an award in the absence of the other arbitrator without notice to him. There is much stronger reason why a sole arbitrator should not be permitted to make an award based upon evidence taken without notice to the party against whom it was used.

The judgment is reversed, with directions to set aside the award; to transfer the cause to the equity docket, and refer it to a commissioner for a settlement of the accounts between the parties, and to allow them to amend their pleadings.

**Elliott v. Commonwealth.**

(Decided September 19, 1913.)

**Appeal from Graves Circuit Court.**

1. **Homicide—Criminal Law—Motion for Continuance.**—Where the trial court in overruling appellant's motion for a continuance, held that he might read the affidavit stating what absent witnesses would testify if present, which privilege he did not take advantage of, there is no merit in the contention that the court erred in refusing a continuance.
2. **Homicide—Criminal Law—Evidence of Accomplices—Corroboration.**—The claim that the evidence of the accomplices is not sufficiently corroborated to justify conviction cannot be upheld. Several witnesses testified that they saw appellant at the scene of the shooting shortly after it occurred with a pistol in his hand, and one or more witnesses testified that appellant on that day admitted that he had done the killing, and this evidence taken in connection with the evidence of the accomplices that appellant did the shooting justified the jury in reaching the conclusion it did.
3. **Jury—Alleged Misconduct of Juror.**—Where a statement of a juror was merely an expression of disapproval at appellant's course in changing his testimony at the second trial, it cannot be said to indicate that he had made up his mind as to appellant's guilt. (For former opinion, see 152 Ky., 791.)

W. S. FOY for appellant.

JAMES GARNETT, Attorney General, O. S. HOGAN, Assistant Attorney General for appellee.

**OPINION OF THE COURT BY JUDGE TURNER—Affirming.**

This is the second appeal of this case; the opinion on the former appeal will be found in 152 Ky., 791.

On the last trial from which this appeal is prosecuted appellant was convicted of voluntary manslaughter; on that trial the evidence was substantially the same as recited in the former opinion, except that Wadlington and Magness, who were jointly indicted with appellant, testified.

Magness' statement as to what occurred at the barn when Dallas was killed is in substance that when Dallas came to the barn after the other three had gone there he upbraided him (Magness) for allowing Wadlington to have his horse and buggy to follow him out the road; and that while he and Dallas were in this altercation, Wadlington attacked Dallas and struck him over the



head with a beer bottle and knocked him to his knees, and that while Dallas was on his knees Wadlington handed Elliott a pistol and told him to shoot Dallas, and that if he did not he would knock him down, and Elliott shot.

Wadlington's statement is in substance that when Dallas came into the barn he and Magness immediately engaged in a difficulty, and that Elliott interfered, and he (Elliott) and Dallas had some words, and Elliott told Dallas not to jump on the boy; that they then became engaged in a difficulty, and Dallas had an open knife in his hand and advanced upon Elliott and chased him around the buggy twice, Elliott fleeing from him, and then Elliott shot.

Appellant's first complaint is that the court erred in refusing to give him a continuance; he filed his affidavit stating what certain absent witnesses would testify if present, and the court in overruling his motion for continuance held that he might read the affidavit as the deposition of such witnesses, which privilege he did not take advantage of on the trial. The claim that the evidence of Wadlington and Magness, accomplices of appellant, is not sufficiently corroborated to justify conviction, cannot be upheld; several witnesses testified that they saw appellant at or near the barn door shortly after the shooting with a pistol in his hand, and one or more witnesses testified that appellant on that day admitted that he had done the shooting.

Certainly this evidence taken in connection with the evidence of Magness and Wadlington would justify the jury in reaching the conclusion it did.

Lastly, it is urged that a new trial should have been granted because of the misconduct of one of the jurors; appellant filed the affidavits of four parties who stated that they were present at the former trial with the juror, David Frazier, and that they heard the testimony of Elliott on that trial, and that Frazier said, at the time, "That Clarence Elliott ought to have his neck broken because he had changed his statement." This statement of the juror made at the time of the second trial referred to the change in the testimony of appellant, he having testified on the first trial that he had done the shooting, and on the second trial that Wadlington had done it.

There is nothing in this statement of the juror which indicates that he had made up his mind as to the guilt of appellant; it was merely his manner of expressing

disapproval of appellant's course in changing his testimony at the second trial, or was his way of saying that he thought it was an unwise move on appellant's part.

Upon the whole record we are of the opinion that appellant had a fair and impartial trial.

Judgment affirmed.

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### **Wayne (alias Wing) v. Commonwealth.**

(Decided September 19, 1913).

#### **Appeal from Henry Circuit Court.**

1. **Homicide—Involuntary Manslaughter—Voluntary Manslaughter—Accidental and Unintentional Killing—Instructions.**—It has been the uniform ruling of this court in cases where homicide is claimed to be accidental, and there is any evidence to justify it, that it is the duty of the trial court not only to give an instruction upon accidental and unintentional killing, but to give one based upon the reckless or grossly careless use of fire arms constituting voluntary manslaughter.
2. **Homicide—Involuntary Manslaughter—Voluntary Manslaughter—Accidental Killing—Instructions.**—Where the jury might very well have believed from the evidence that the killing was unintentional, but believe at the same time that appellant was so careless and reckless in handling the pistol that he ought to have been punished more severely than by a fine and jail sentence, under an involuntary manslaughter instruction the jury had no alternative except to adjudge him guilty of involuntary manslaughter, and thereby impose the small penalty of fine and imprisonment, or inflict the extreme penalty of life imprisonment, or death, and under the evidence and rule referred to, the failure to give an instruction upon voluntary manslaughter was error.

W. B. MOODY, MOODY & BARBOUR, W. P. THORNE and J. R. FEARS for appellant.

JAMES GARNETT, Attorney General, D. O. MYATT, Assistant Attorney General for appellee.

#### **OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

Appellant was indicted in the Henry Circuit Court charged with the murder of Pryor Martin.

On his trial he was adjudged guilty, and sentenced to confinement in the penitentiary for life, and from that judgment he appeals.

The trial disclosed that they were both negro men, and worked for Mr. James Foree, in Henry County; that they kept bachelor's hall, and lived together in a small house belonging to him and had for several months before the killing; that they had always appeared to be on good terms, in fact as stated by Mr. Foree that they acted like brothers.

On one Sunday in December, 1912, they each procured from their employer a horse and buggy, one to go one place and the other to another, but it appears that that afternoon they met at the residence of Martha Darkess, another negro in the vicinity, where there was quite a gathering of negroes.

While appellant and Martin were there, and while they together with two negro women were in a room, Martin was shot in the temple by a pistol in the hands of appellant and immediately died.

The two negro women who were in the room stated in substance that they were on one side of the room engaged in looking at some pictures on the wall; that they heard no words or altercation of any kind between the two men, that their backs were turned when the pistol fired; that there had been no quarrel or unpleasantness.

Immediately after the shooting appellant left the room and went out into the yard where, as stated by three or four of the negroes, he said he had killed Pryor Martin, and that he had just as soon kill two or three as not; he thereupon got into his buggy and taking one of the negro women with him went to his brother's nearby where he stayed until Monday when he disappeared; afterwards he was located and arrested in Indiana.

Appellant admitted that before the occurrence in question he had taken one or more drinks of whisky, but there is no evidence that he was to any great extent under the influence of it.

Appellant's own testimony is in substance that he and Martin were on excellent terms, that there had never been any difficulty or misunderstanding between them, that Martin was the best friend that he had ever had, and that the shooting was purely accidental.

His version of how the shooting happened is that while he was standing in front of the grate and Martin sitting in a chair nearby, Martin asked him to lend him his gun, and that he said all right; that he then pulled his gun (meaning pistol) out of his pocket and com-

menced working the trigger or cylinder when it went off and shot Martin.

The contention of appellant that there was a total failure of proof of malice, and that all the facts and circumstances show that the killing was purely unintentional, and for that reason the verdict is flagrantly against the evidence, cannot be sustained in the light of the testimony of the negroes who stated that appellant said immediately afterwards that he had killed Pryor, and would just as soon kill two or three more.

From this evidence the jury had the right to infer malice.

The court instructed on involuntary manslaughter, but failed to give an instruction on voluntary manslaughter, and it is urgently insisted that from the evidence appellant was entitled to that instruction.

Under the instructions as given, the jury had no alternative except to adjudge the defendant guilty of involuntary manslaughter, and thereby imposed upon him a small punishment of fine and imprisonment in the county jail, or give him the extreme penalty of life imprisonment or death.

It has been the uniform ruling of this court in cases where homicide is claimed to be accidental, and there is any evidence to justify it, that it is the duty of the trial court not only to give an instruction upon accidental and unintentional killing, but to give one based upon the reckless or grossly careless use of firearms constituting voluntary manslaughter. This whole question is exhaustively treated in recent opinions of this court in the cases of *McGeorge v. Commonwealth*, 145 Ky., 540, and *Pash v. Commonwealth*, 146 Ky., 390. In those cases the authorities are all referred to and discussed.

In this case the jury might very well have believed from the evidence of appellant that the killing was unintentional, but believe at the same time that he was so reckless and careless in handling the pistol that he ought to have been punished more severely than by a mere fine and jail sentence; and yet under the instructions of the court they had no alternative except to thus practically turn him loose or give him a life sentence.

Under the evidence in this case the ends of justice and the rule referred to require that the voluntary manslaughter instruction should be given.

Judgment reversed for new trial, and for further proceedings consistent herewith.

**Partin v. Commonwealth.**

(Decided September 19, 1913).

**Appeal from Whitley Circuit Court.**

1. **Evidence—False Swearing—Pendency of Prosecution—Record—Parol Proof.**—On a trial for false swearing, where there is a record of the proceeding at which it is alleged the false testimony was given, parol evidence of the pendency of that proceeding is inadmissible in the absence of the loss of such record.
2. **False Swearing—Acquittal of Defendant—Effect on Prosecution Against Witness Who Gave False Testimony.**—The acquittal of the defendant on a trial at which it is alleged a witness other than the defendant testified falsely does not prevent the conviction of such witness for false swearing.
3. **Instructions—False Swearing.**—An instruction telling the jury that before they can find the defendant guilty of the crime of false swearing they must not only believe from the evidence beyond a reasonable doubt that he has been proven guilty, but that each substantive fact necessary to make out the crime, as set forth in the preceding instruction, must be supported by evidence of two witnesses or one witness and strong corroborative circumstances, is erroneous. The court should have told the jury that they must acquit the defendant unless it be proven that he swore falsely by two witnesses, or by one witness and strong corroborative circumstances.
4. **False Swearing—Materiality—Relevancy of Alleged False Testimony—Question for Court.**—On a trial for false swearing it is not necessary that the alleged false testimony be material; it is only necessary that it be relevant, and its relevancy is a question for the court and not for the jury.

R. S. ROSE for appellant.

JAMES GARNETT, Attorney General and O. S. HOGAN, Assistant Attorney General for appellee.

**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.**

Appellant, Wesley Partin, was convicted of the crime of false swearing in the Whitley Circuit Court. From the judgment of conviction he appeals.

It appears that Wiley Partin was arrested on a warrant and tried before J. A. West, justice of the peace, of Whitley County, for the offense of having in his possession spirituous, vinous and malt liquors in local option territory for the purpose of sale therein. On that trial the appellant, who was the father of Wiley

Partin, appeared as a witness. According to the evidence for the Commonwealth, he swore that at no time had Wiley Partin had any whiskey or beer in appellant's house for the purpose of sale, and that he himself and no one else had ever had any whiskey or beer in his house for the purpose of sale, with his knowledge. In the present case several witnesses testified that on the trial in question Wesley Partin gave the foregoing evidence, and several witnesses also testified that they frequently brought whiskey and beer in Wesley Partin's house with his knowledge and consent. There can be no doubt, therefore, that the evidence is sufficient to sustain the conviction if no prejudicial errors were committed against appellant.

J. A. West testified that he was a justice of the peace, and that he conducted the trial of Wiley Partin on the charge of selling liquor through and by one John Jenkins. He believed the case was tried before a jury. On that occasion appellant was sworn as a witness and testified for his son. Thereafter the witness testified as follows:

"Q. Tell the jury what he stated there as to whether or not whiskey or beer had been sold in his house, or had been there for purpose of sale?

"Counsel for defendant objected to the question and the court overruled the objection, to which ruling of the court counsel for defendant excepted at the time.

"A. My recollection is he stated there never had been any there for the purpose of sale.

"Q. Was he asked, or do you remember if he was asked, if Wiley Partin, or himself or any one else had beer there, or was it just a general question?

"Counsel for defendant objected to the question and the court overruled the objection, to which ruling of the court counsel for defendant excepted at the time.

"A. My recollection is it was a general question.

"Q. He said there never had been any whiskey or beer there for the purpose of sale before that time?

"A. Yes.

"Q. Was that question being tried there in that case, whether there had been liquor in his house for sale—was that one of the questions in issue?

"Counsel for defendant objected to the question and the court overruled the objection, to which ruling of the court counsel for defendant excepted at the time.

"A. Yes, that is the way I remember it.

"Q. As the Magistrate trying the case can you state to the jury whether or not the evidence, or the questions asked him and the answers given by him were material to the case being tried?

"Counsel for defendant objected to the question and the court sustained the objection, to which ruling of the court counsel for plaintiff excepted at the time.

"Q. I believe you stated that was one of the questions asked him?

"A. Yes.

"Q. When was that, Joe?

"A. I don't remember exactly, but believe it was the first Saturday in April.

"Q. Before the 13th day of June when the indictment was returned?

"A. Yes.

"Q. In Whitley County?

"A. Yes."

On cross-examination witness was asked if he did not have a record of the trial, and he said yes. He also stated that he supposed he had the warrant in his desk.

The first error complained of is the admission of the foregoing evidence, by which the witness was permitted to prove by parol evidence the character and pendency of the prosecution against Wiley Partin. In other words, the jurisdiction of the court is made to appear by parol only. This evidence should have been excluded, and the record of the prosecution introduced. This precise question was before the court in *Goslin v. Commonwealth*, 28 Ky. L. R., 687, where the court used the following language:

"The trial court allowed the Commonwealth to prove that the prosecution before the county judge was pending when he administered the oath to the accused. We think that the rule of evidence that a fact shown by a public record must be proved by the record, applies. There was of necessity a record of the trial. It would have shown the offense charged, and that the prosecution was pending when the oath which is the subject of this inquiry was administered, and the testimony was given. The record would not necessarily show that appellant was sworn as a witness and that fact, therefore, may be shown by other evidence. But the record would prove the jurisdiction of the court to administer the oath and require the testimony in that proceeding. (*Commonwealth v. Davis*, 94 Ky., 612.)"

Of course, if it was made to appear that the record had been lost or destroyed, then parol evidence of its contents might be introduced.

It is next insisted that the defendant was entitled to a peremptory instruction. This contention is based on the fact that Wiley Partin was acquitted on the trial before the justice of the peace. In support of this position we are cited to the case of *Cooper v. Commonwealth*, 21 Ky. L. R., 546, where it was held that a defendant who was acquitted of a crime could not subsequently be convicted of swearing falsely at that trial. That opinion is based on the fact that having been acquitted by one jury, it would be necessary for another jury to find him guilty of the same offense in order to convict him of false swearing. In discussing the case the court said:

"It certainly was never intended that the enginery of the law should be used to accomplish such inconsistent results."

We are not inclined, however, to extend the doctrine so as to include witnesses other than the defendant on trial. The very fact that he succeeds by false testimony in securing the acquittal of the defendant affords all the greater reason for punishing him. It will not do to say that because a criminal is acquitted by false testimony, he who gave that testimony should forever afterwards go unwhipped in justice. It follows that a peremptory instruction was properly denied.

Instruction No. 2 given by the court is as follows:

"Before you can find the defendant guilty of the crime of 'false swearing,' you must not only believe from the evidence beyond a reasonable doubt, that he has been proven guilty, but each substantive fact necessary to make out the crime, as set forth in instruction No. 1 above, must be supported by the evidence of two witnesses, or one witness and strong corroborative circumstances."

It will be observed that this instruction requires that each substantive fact necessary to make out the crime must be supported by the evidence of two witnesses or one witness and strong corroborative circumstances. This instruction did not fairly present the question to the jury. The court should have told the jury that they must acquit the accused unless it be proven that he swore falsely by two witnesses or by one witness and strong corroborative circumstances. *Howell v. Com-*



monwealth, 31 Ky. L. R., 983; Goslin v. Commonwealth, 28 Ky. L. R., 683.

While upon the subject of instructions it is proper to say that on next trial the court will omit from said instructions the following: "Which said statements were material and relevant upon the trial of said case." On a trial for false swearing it is not necessary that the alleged false testimony be material. It is only necessary that it be relevant, and its relevancy is a question for the court and not for the jury. Commonwealth v. Maynard, 91 Ky., 131, 15 S. W., 52.

The court will also substitute the words "and that" in lieu of the word "when" at the beginning of the clause "when in truth and in fact the said Wiley Partin had before said time, etc." This will save the instruction from the appearance of assuming as true the statements following the word "when," all of which are questions to be determined by the jury.

Judgment reversed and cause remanded for new trial consistent with this opinion.

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### Williams v. Lawson.

(Decided September 19, 1913).

#### Appeal from Knox Circuit Court.

**Pleading—Supplying Lost Pleadings—Trial.**—When the pleadings in an action are lost, it is improper for the court to compel one of the parties to try the case until the pleadings are supplied or found.

B. B. GOLDEN, JAMES D. BLACK, H. H. OWENS and FITZGERALD, BLACK FOR appellant.

R. S. ROSE for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—**  
**Reversing.**

On January 20, 1912, the plaintiff tendered in this case an amended petition to the filing of which the defendant objected and the court took time on the motion. On April 27, the case was submitted on the motion, and the amended petition was filed. The defendant on the same day filed answer to the amended petition. On the calling of the case on that day for trial, the defendant

moved for a rule against the clerk to produce the original papers, the petition and amendment thereto, answer, reply, motion to strike and reply; the rule was granted; the clerk appeared and answered under oath that he did not have the papers in his office or custody, but that the same were charged upon the records of his office to the plaintiff's attorney, R. S. Rose, as having been taken from his office on September 18, 1911, and that Rose's name was signed upon the record as having on that day received them. Thereupon Rose stated that he did not have the papers and did not know where they were, and could not produce them. The defendant's attorney objected to proceeding to trial unless the papers were produced or supplied. The court overruled the objection and required the case to go to trial on the amended petition filed on that day. Counsel for defendant stated to the court that if the original papers were found, they would show that this amended petition was a complete departure from the cause of action set out in the petition; but the court overruled the motion to strike out the amendment and stated that he had never seen or read or considered the original pleadings in the case. Counsel for defendant protested against trying the case in the absence of the pleadings and stated to the court that he would not participate in the trial unless the papers were produced or supplied. But the court over his objection, required the trial to proceed, and counsel for the defendant withdrew and declined to have anything further to do with the trial of the case. The court thereupon impannelled a jury, and the evidence for the plaintiff being heard, there was a verdict and judgment for the plaintiff. The defendant's motion for a new trial having been overruled, he appeals.

The first order in the case, made on November 23, 1909, shows that the plaintiff offered to file an amended petition to which the defendant objected. By the next order made on November 26, 1909, the amended petition was filed. By the next order made on January 31, 1910, the defendant filed an answer. On February 1, 1910, the plaintiff filed a general demurrer to the third paragraph of the answer and on the same day, he filed a reply to it. On February 17, he filed a demurrer to the second and third paragraphs of the answer, and on the same day the demurrers to the second and third paragraphs of the answer were overruled. On the next day the plaintiff moved the court to require the defendant to elect

whether he would rely on the defense set out in the first paragraph of his answer or that set out in the second and third paragraphs of the answer, and on the same day this motion was overruled. The above are the only orders made in the case, except some orders to procure the attendance of witnesses, and a motion by the plaintiff made on November 16, 1911, for judgment.

In the absence of the petition, answer and reply it cannot be intelligently determined whether the amended petition filed on April 27, 1912, should have been filed, and in the absence of the original pleadings, it cannot be determined what were the issues in the case. To try the case without these pleadings was in effect to try it without pleadings. Under the Code, a civil action is a demand by pleadings in a court of justice for the enforcement of an alleged right of a plaintiff against a defendant (Sec. 2); pleadings are statements by parties to an action of their cause of controversy (Sec. 87); parties must before trial form a material issue concerning each cause of controversy, and it is the duty of the court upon or without motion, to compel them to do so (Sec. 114); every pleading must be verified except as otherwise provided (Sec. 116). The purpose of the Code in requiring the cause of controversy to be set out in written pleadings is that the court may intelligently try the case and that the parties may intelligently prepare for trial; but, if after they have pleaded to an issue as in this case, the court may require them to try the case without the pleadings, the provisions of the Code above referred to, would be entirely defeated of their purpose.

There is nothing in the record to indicate that the defendant was in any way responsible for the loss of the papers. The court may by process of contempt or other proper proceeding, amply protect itself where one of the parties, to delay a trial, suppresses the papers; but the case cannot be tried on the merits in the absence of the record, until the record is supplied. The circuit court erred in directing the trial to proceed when the original papers were lost, and had not been supplied.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

**Coffey, et al. v. Humble, et al.**

(Decided September 19, 1913).

**Appeal from Russell Circuit Court.**

1. Land—Parol Purchase—Rent.—Where one takes possession of land under a parol purchase of same, although he cannot defeat an action for its recovery by the holder of the legal title, or enforce a specific performance, he has a resisting equity, which entitles him to a lien upon the land for the consideration paid for it and the enhanced value given the land by such lasting and valuable improvements as, he may, in good faith, have put upon it, but is chargeable with rent during his occupancy thereof.
2. Land—Rent—How Regulated.—In adjusting the rights of the parties under the above rule, the correct rule as to the quantum of rents is that they should be regulated by the interest on the consideration and on the value of the improvements, being neither greater nor less than their united amount.

**J. H. STONE, J. F. MONTGOMERY** for appellants.**BERTRAM & PHELPS** for appellees.**OPINION OF THE COURT BY JUDGE SETTLE—Reversing.**

This action was brought by the appellants, Essie Bell Coffey, Jonah Lee Coffey and Otha Lee Coffey, infants by their statutory guardian, Thomas Coffey, to recover of the appellees, J. E. Humble and Sandy Tucker, the possession of a forty-acre tract of land lying on the waters of Wolf and Dud creeks in Russell county; also \$100 damages for the cutting of timber therefrom by appellees, and \$150 damages for five years' possession and use of the land by them; it being alleged in the petition that the above-named infant appellants are the owners in fee, and entitled to the immediate possession, of the land, and that appellees are illegally in the possession thereof.

Appellees' answer traversed the averments of the petition and, in addition, alleged title in themselves to the land, acquired through appellants' ancestor as follows: That is, that the mother of the infant appellants, Narcissa Coffey, then living, in 1901 by purchase, and a deed from Junius Popplewell, acquired the legal title to and possession of the land in question, and two years thereafter, for \$75 cash in hand, sold it to James Tucker, who sold it to Asa Lawless; that Lawless sold it to the appellant, Thomas Coffey, who sold it to William

Stephens, who sold it to appellee, Sandy Tucker, by whom it was sold to appellee, J. E. Humble, and the latter, a year later, resold ten acres of it to Sandy Tucker.

Although it is alleged in the answer that each sale of the land referred to was for a valuable consideration, it is therein admitted that, beginning with James Tucker and ending with Sandy Tucker, none of the several purchasers of the land received a deed of conveyance thereto, or other writing evidencing the sale, from his vendor. It is, however, alleged in the answer that when James Tucker purchased the land of Narcissa Coffey, she delivered to him, unrecorded, the deed by which Junius Popplewell had conveyed it to her, and that she then placed him in possession of the land; also that each subsequent sale of the land down to that made to Sandy Tucker was accompanied by a delivery, by the vendor to his vendee, of the Popplewell deed and the possession of the land; but that when Sandy Tucker sold it to J. E. Humble, he executed and delivered to him a deed thereto, duly signed and acknowledged by himself and wife.

It is further alleged in the answer that neither the appellees nor any of the intermediate vendees of Narcissa Coffey were ever disturbed by her in their possession of the land; and that, though she lived in the neighborhood of the land from the time of its sale by her to James Tucker until her death four or five years thereafter, she never questioned any of the purchasers' ownership of the land or their legal right to its possession. This alleged acquiescence by Narcissa Coffey in her vendees' possession of the land is pleaded as an estoppel and bar to the claim of title asserted to same by the infant appellants and their guardian.

It is also alleged in the answer that appellee, Sandy Tucker, while in possession of the land in question and, in good faith, believing himself to be the legal owner thereof, erected and made thereon necessary, valuable, and lasting improvements, consisting of a dwelling house and well; and that he cleared and made productive a part of the land not theretofore tillable, at a cost to himself of \$50 for the house, \$50 for the well and \$40 for the clearing.

The answer was made a counterclaim and judgment prayed for the value of these improvements, together with the purchase price paid by James Tucker to Narcissa Coffey for the land, with interest on the whole; also for the sale of the land for its payment, in the event the

court should adjudge appellants entitled to recover the land.

Appellants, by reply, assailed the validity of the several sales of the land set out in the answer, under which appellees claim title; alleged that none of them was enforceable, the same not being in writing, and pleaded the statute of frauds.

The case was transferred to the equity docket and, on the hearing, the circuit court, by the judgment rendered, dismissed both the petition and counterclaim, at appellants' cost, and the latter have appealed.

In thus disposing of the case the circuit court erred. As the several contracts with respect to the sale of the land, under which appellees claim title, were not in writing, and were for this reason within the statute of frauds, they are unenforceable; Kentucky Statutes, Sec. 470, sub-sec. 6; *Boone v. Coe*, 153 Ky., 233; *Bull v. McCrea*, 8 B. Mon., 423; *Greenwood v. Strother*, 91 Ky., 482; therefore, *Narcissa Coffey* was never divested of the title to same, for which reason, at her death it passed or descended, under the statute, to her surviving children, the infant appellants, as her heirs at law. But, while the latter are not estopped by the verbal sale made of the land by the mother, or by her acquiescence in its possession by her vendee and subsequent like purchasers, from recovering it, they cannot do so without restoring to appellees the consideration their mother received for the land from her vendee, *James Tucker*, at the time of its verbal sale to him, and compensating them for such valuable and lasting improvements as they may have put upon the land.

It is well settled that, where one takes possession of land under a parol sale, although he cannot defeat an action for the recovery of the land by the vendor, nor enforce a specific performance, he has a resisting equity which entitles him to a lien upon the land for the consideration paid for it and the value of such improvements as he, in good faith, made or placed upon it, that is, an amount equal to the increase in the vendible value of the land caused by the improvements. *Fox v. Langley*, 1 Mar., 388; *McCracken v. Sanders*, 6 T. B. Mon., 557; *Dean v. Cassidy*, 88 Ky., 572; *Usher v. Flood*, 83 Ky., 552; *Bullitt v. Eastern Ky. Land Co.*, 99 Ky., 324; *Elliott v. Walker*, 145 Ky., 71.

It is not to be overlooked, however, that, in such case, the vendee under the verbal sale is to be charged with

the rental value of the land for the years the vendor is deprived of the possession of it. The rule adopted by this court as to the quantum of rents is stated in *Morton's Heirs v. Ridgeway, et al.*, 3 J. J. Mar., 258; *Hawkins v. Brown, et al.*, 80 Ky., 186, and in the more recent case of *Weber v. Lightfoot, et al.*, 152 Ky., 83, as follows:

"The rents should be regulated by the interest on the consideration and on the value of the improvements, being neither greater nor less than their united amount."

Upon the return of the case to the circuit court, such judgment should be rendered as will adjust the rights and equities of the parties according to the rule above indicated; the court being governed by the weight of the evidence contained in the record and such further evidence, if any, as may be taken by the parties in ascertaining the consideration actually received for the land by appellants' mother, Narcissa Coffey, and in ascertaining the extent, if any, to which the vendible value of the land has been enhanced by the improvements made upon the land by appellees. In adjudging to the infant appellants restoration of the land, appellees should be given a lien thereon for such amount, if any, as may be found in their favor; and the land, or so much thereof as may be necessary for the purpose, be ordered sold to pay same.

For the reasons indicated, the judgment is reversed and cause remanded for such further proceedings and judgment as will conform to the opinion.

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### Clair v. Commonwealth.

(Decided September 19, 1913).

#### Appeal from Powell Circuit Court.

1. **New Trial—Absence of Counsel—Continuance.**—The refusal of the circuit court to grant the defendant a new trial on the ground of the absence from the trial of counsel first employed by him, was not error, where there was no complaint of the absence of such counsel when or before the trial began, nor motion made for continuance because of their absence.
2. **New Trial—Newly Discovered Evidence.**—A new trial on the ground of newly discovered evidence was properly refused when it was apparent to the court from the record that the witnesses, by whom defendant claimed such evidence would be furnished, were

3. **New Trial—Homicide—Absence of Witnesses.**—It was, however, error for the court to refuse the defendant a new trial on account of the absence of a witness, for whom an attachment had, at the previous term, been awarded because of his failure to attend court in obedience to a subpoena served upon him; it being made to appear, by the defendant's affidavit, that the testimony of such witness would have corroborated that of the defendant as to certain facts unknown to any other witness, which occurred immediately before the homicide and which conduced to prove that deceased would then have killed the defendant but for the interference of the witness.

**JAMES GARNETT, Attorney General, D. O. MYATT, Assistant Attorney General for appellee.**

The appellant was tried and convicted of voluntary manslaughter in the court below, under an indictment charging him with the murder of Jack (Bummer) Spicer. The homicide occurred in Breathitt County, but, on application of the Commonwealth's attorney, the venue was changed to Russell County where the trial took place. Three grounds were relied on by appellant for a new trial, and are now urged for a reversal of the judgment, viz.: First, absence, at the time of the trial, of the counsel whom he had first employed in defense; second, the refusal of the circuit court to grant continuance, on account of the absence of one of the material witnesses; and third, newly discovered evidence.

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defense, and that he was represented throughout the trial by both Spencer and Atkinson.

If appellant had been of the opinion that he could not safely go into the trial without the presence of Messrs. Adams, Holiday and Redwine, he should have made that fact known to the court when the case was called for trial and asked a continuance on account of their absence. Having failed to urge his complaint of the absence of counsel named at the proper time, such complaint could not be considered by the court as a ground for a new trial. *Cook v. Commonwealth*, 114 Ky., 586; *Stephens v. Commonwealth*, 9 Rep., 742; *Brown v. Commonwealth*, 7 Rep., 451.

Appellant's second contention presents a more serious question and, in order to intelligently pass upon it, consideration of the evidence introduced on the trial is here necessary. It, in brief, discloses the following state of facts: On Sunday, January 7, 1912, appellant went to the store of Henry Noble on Wolf creek, in Breathitt County, to make a settlement of some business he had with Noble. He there met the deceased, Jack Spicer, and a number of other persons. Spicer, who was partially intoxicated and armed with a pistol, encountered appellant in front of the store and, without provocation, cocked the pistol and presented it at him, remarking at the time, "I am the worst damned son of a b—h that ever hit this county." Upon seeing the pistol thus pointed at him, appellant said to Spicer, "Don't do that, Bummer. What do you want to kill me for, I am your friend." It does not appear that Spicer made any reply, but, at that juncture, William Moore, who was standing near, caught Spicer's arm and shoved the pistol away, so that it no longer pointed at appellant. Appellant then went into the store and requested William Allen, a deputy sheriff present, to go to Spicer and disarm him, saying at the time, "He cocked and presented his pistol on me out at the door and tried to kill me. If he does that any more, I will shoot his heart out." Allen refused to perform the service requested of him by appellant, giving as a reason for such refusal that, as he and Spicer were not on friendly terms, the latter would shoot him if he attempted to disarm him.

Down to this point there is no controversy as to what occurred. The facts, thus far stated, were established by the testimony of appellant alone, as William Moore was the only other person with appellant and Spicer in

front of the store, and Moore was not present at the trial. As to what occurred later in the store and at the time of the homicide, numerous witnesses gave their testimony. That of the Commonwealth, furnished by Henry Noble and Bud Noble, was to the effect that Spicer, when he walked into the store, had his pistol in his right hand, holding it by the muzzle; that he presented the handle to Henry Noble and said to him, "Henry, come and get her," and that, as he thus held the pistol, appellant jumped at Spicer, caught and held him by the hand, drew a pistol and fired five shots at him, the last one striking Spicer in the back of the head after he fell to the floor.

The testimony of appellant, and at least four other witnesses, as to what occurred in the store and at the time of the shooting, radically differs from that of the two witnesses for the Commonwealth. It was, in substance, that appellant, while standing in the door immediately before Spicer entered the store, was cursed and threatened by the latter and ordered by him to stand back out of the door; that appellant, after remonstrating with Spicer, left the door and stepped back a few feet therefrom, whereupon Spicer entered the store, with pistol in hand, the muzzle of which he pointed at appellant as if to shoot him, and, while in this position, his hand was grabbed by appellant, and while holding him in this position appellant shot and killed him, in the manner already indicated.

It may well be said that, while the testimony of the two witnesses for the Commonwealth conduced to prove that the shooting of Spicer by appellant was inexcusable, appellant's testimony, and that of the several witnesses introduced in his behalf, as strongly conduced to prove that, in shooting Spicer, he acted in his necessary self defense. In view of this situation, the testimony of William Moore, the witness on account of whose absence appellant asked a continuance of his case, was very material and important to his defense. If, as stated in the affidavit for the continuance filed by appellant, Moore would have testified as to what occurred between appellant and Spicer in front of the store as the facts were related by appellant in his testimony, the corroboration thereby given the testimony of the latter would, in all probability, have had great weight with the jury. The facts as to what occurred in front of the store were known only to appellant and Moore. As the other wit-

nesses were all, at the time, in the store, they did not profess to have heard or seen what passed between appellant and Spicer before the latter entered the store, and the jury, by reason of the manifest desire of appellant to escape conviction for the killing of Spicer, were doubtless disposed to regard, with suspicion, his unsupported testimony; whereas, if it could have been corroborated by that of Moore, the inducement to them to have accepted it as a true statement of the facts would have been calculated to have caused a different verdict. In order to realize the importance to appellant of Moore's corroboration of his statement as to what occurred in front of the store, it may be remarked that it would have served to show the violent character and maliciousness of Spicer, the condition of his mind immediately preceding the killing, and that the motive with which he thereafter entered the store was to follow up and bring on a difficulty with appellant, for the purpose of inflicting upon him bodily harm or killing him; also that appellant had attempted to avoid a difficulty with him.

Indeed, the materiality of Moore's testimony is not seriously denied by counsel for the Commonwealth, but it is argued by them that the affidavit for the continuance fails to show that appellant used proper diligence to procure the attendance and testimony of Moore at the trial. This argument is based wholly on the fact that, as at the previous term of the court, attachments for Moore had, by order of the court, been directed to be issued for the trial term to both Breathitt and Owsley Counties, the failure of appellant to have one issued and sent to Owsley County showed a want of diligence on his part that justified the court's refusal of the continuance. The affidavit states that Moore's residence is in Breathitt County and that the attachment ordered for that county by the court, was, in due time, issued and sent to the sheriff of the county, by whom it was returned unexecuted without giving any reason for his failure to execute it. It does not appear from the record that appellant knew that the order of the court required the issuance of an attachment for Moore to Owsley County, or that Moore had changed his residence to that county, if such was the fact, and he denied such knowledge.

We find nothing in the record to justify the charge of lack of diligence on the part of appellant in attempt-

ing to secure the testimony of Moore, and, in view of the statements of the affidavit and the absence of a showing that he asked for, or knew, of the order for an attachment to Owsley County for Moore, or knew of his removal from Breathitt to Owsley County, we will not indulge the presumption of negligence attributed to him by the trial court. In this connection, it should not be overlooked that appellant, previous to his trial, was confined in the jail of a county other than that in which the trial was had, and that the only one of his counsel residing in Powell County was not employed by him until after the beginning of the term of court at which the trial occurred. It cannot, therefore, be said that appellant was so situated as to employ the customary facilities for procuring the attendance of witnesses. All the circumstances considered, we are of opinion that he was entitled to the continuance asked, and that the refusal of the court to grant it was an abuse of discretion, and, therefore, error.

If the court had permitted to be read as evidence, so much of appellant's affidavit as purports to state the facts to which, it is therein claimed, Moore would, if present, have testified, we would be unwilling to hold that the refusal of the continuance was error; but, as this was refused, he should have another trial, with opportunity to procure thereat, the testimony of Moore. *Mount v. Commonwealth*, 120 Ky., 398; *Davis v. Commonwealth*, 121 S. W., 429.

Appellant's complaint of the refusal of the court to grant him a new trial, on the ground of newly discovered evidence, cannot be sustained. It was claimed that the newly discovered evidence would be furnished by John Deaton and Brownlow Deaton. It would be useless to discuss the evidence it is said these witnesses would produce, as it is patent that by even slight diligence, it could have been discovered by appellant in ample time for use on his trial. With reference to these witnesses and what they would testify, the opinion of the circuit judge, delivered on the motion for a new trial, in part, states: "The record in this case shows that on the 26th day of November, 1912, both the John Deaton and Brownlow Deaton mentioned in the defendant's motion were in attendance as witnesses for defendant, and were recognized to appear at this term as witnesses for defendant, but to be paid by the Commonwealth. The record also shows that those two witnesses were pres-

ent at this term of court when the defendant was tried, and were allowed their claims to be paid by the Commonwealth." In view of the foregoing facts, which are fully sustained by the record as stated in the opinion, it is absurd for appellant to claim that he had no opportunity, until after his trial, to learn from these witnesses the facts in their possession with respect to the homicide. If they really knew, and would have testified to, the facts attributed to them on the hearing of the motion for a new trial, a single brief conversation with them by appellant, or his counsel, while they were attending his trial, or at the previous term when they were recognized as witnesses for him, would readily have elicited information of such facts and enabled appellant to use them upon the trial. *Ellis v. Commonwealth*, 146 Ky., 715.

No complaint is made of the instructions. They correctly state the law applicable to appellant's case.

Because of the error committed by the trial court in refusing the continuance asked by appellant, the judgment is reversed and case remanded for a new trial consistent with the opinion.

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### Commonwealth v. Lee.

(Decided September 19, 1913).

#### Appeal from Hickman Circuit Court.

1. Appeal—Appeal in Felony Case—Filing of Transcript—Jurisdiction.—Section 337, Criminal Code of Practice provides: that, in order to enable the Commonwealth to take an appeal to the Court of Appeals from a decision or judgment of the circuit court, in a felony case, the transcript of the record must be lodged in the clerk's office of the Court of Appeals, "within sixty days after the decision." This provision of the Code being mandatory, if the transcript be not filed in the clerk's office of the Court of Appeals within the required sixty days, the Court of Appeals will be without jurisdiction to entertain the appeal.
2. Appeal—Filing of Transcript—Jurisdiction.—Where the decision was rendered and appeal prayed and granted May 22, 1913, and the transcript was not filed in the clerk's office of the Court of Appeals, until July 21, 1913, the latter court is without jurisdiction of the appeal, for, as the day upon which the decision was rendered is to be counted one of the sixty days, the limit of time for filing the transcript in the clerk's office of the Court of Appeals expired on the day before the transcript was filed therein.

3. **Appeal—Filing of Transcript—Computation of Time.**—It is a well recognized rule of law that, where the computation is to be made from the act done, then the day upon which it is done must be included.

**JAMES GARNETT**, Attorney General, **D. O. MYATT**, Assistant Attorney General, **R. L. SMITH** and **J. D. VIA** for appellant.

**ROBBINS & ROBBINS** and **JOE W. BENTON** for appellee.

**OPINION OF THE COURT BY JUDGE SETTLE**—Dismissing appeal.

Appellee was tried and acquitted in the court below under an indictment charging him with the crime of house burning. The verdict of acquittal resulted from the giving, by the court, of a peremptory instruction directing the jury so to find. The Commonwealth, complaining of the giving of the peremptory instruction and judgment of acquittal, has appealed, and appellee has entered in this court a motion to dismiss the appeal.

The dismissal of the appeal is asked upon the ground that the transcript of the record was not filed in the office of the clerk of this court within sixty days after the trial court's judgment was rendered, as required by section 337 of the Criminal Code. The acquittal of appellee, and judgment of the court discharging him by virtue of the verdict to that effect, occurred and was entered May 22, 1913, and on the same day the Commonwealth prayed, and was granted, an appeal. Transcript of the record, however, was not lodged in the clerk's office of this court until July 21, 1913, sixty-one days after the rendition of the judgment.

Obviously, if the day upon which the judgment was entered should be included in the computation of time, the motion to dismiss must prevail. It has repeatedly been held by this court that, where the computation is to be made from the act done, then the day on which it is done must be included. *Chiles v. Smith*, 13 B. Mon., 461; *Handley v. Cunningham*, 12 Bush, 401; *Louisville Railway Co. v. Wellington*, 137 Ky., 719.

In the case last cited (*Louisville Railway Co. v. Wellington*) the motion for a new trial was overruled on March 13, 1909, and appellant was given sixty days within which to file its bill of exceptions. The bill of exceptions was filed May 12, 1909, sixty-one days later. Section 1016, Kentucky Statutes, provides that, within sixty days after the judgment becomes final the party

excepting shall, unless further time be given him, prepare and file his bill of exceptions. In the opinion, the court, re-affirming the rule laid down in *Chiles v. Smith*, said:

"The rule in regard to the computation of time seems to be that, when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done. But when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded. \* \* \*

"In the case before us the computation is to be made, not from the day itself, but from the act done. The act done was the overruling of the motion for a new trial. The bill of exceptions could have been filed that day; therefore, that day should be counted. Counting March 13th, the day on which the motion for a new trial was overruled, the bill of exceptions was not filed until the sixty-first day; therefore, it was not filed in time. Not having been filed in time, it cannot be considered by this court."

Section 337 of the Criminal Code provides:

"If an appeal on behalf of the Commonwealth be desired, the Commonwealth's attorney shall pray the appeal during the term at which the decision is rendered, whereupon the clerk shall immediately make a transcript of the record and transmit the same to the Attorney General, or deliver the transcript to the Commonwealth's attorney, to be transmitted by him. If the Attorney General, on inspecting the record, be satisfied that error has been committed to the prejudice of the Commonwealth, upon which it is important to the correct and uniform administration of the criminal law that the Court of Appeals should decide, he may, by lodging the transcript in the clerk's office of the Court of Appeals, within sixty days after the decision, take the appeal."

To give this court jurisdiction of an appeal, taken by the Commonwealth in a felony case, a transcript of the record must be filed in the clerk's office of the Court of Appeals within sixty days after the decision or judgment is rendered, which was not done in this case. *Commonwealth v. Schlitzbaum*, 25 R., 1022; *Adkins v. Commonwealth*, 102 Ky., 94; *Commonwealth v. Barbour*, 94 S. W., 634. The fact that the Commonwealth can, as a matter of right, take an appeal from a ruling or judg-

ment of the circuit court does not authorize it to disregard the provisions of the Criminal Code with reference to the manner of taking the appeal; and such right of appeal is conditioned upon its complying with the provisions of the Code, which regulate how the appeal shall be taken; otherwise, the court will be without jurisdiction to entertain the appeal, for section 334 of the Criminal Code provides:

“The Court of Appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions contained in this article.”

We have repeatedly held that the various sections of the Criminal Code, allowing and regulating appeals, are mandatory, and that their provisions cannot be dispensed with, even by agreement of parties. *Metcalf v. Commonwealth*, 84 Ky., 485; *Stratton v. Commonwealth*, 84 Ky., 190; *Gray v. Commonwealth*, 112 Ky., 542; *Adkins v. Commonwealth*, 102 Ky., 94.

In *Smith v. Commonwealth*, 146 Ky., 751, we dismissed the appeal because of the failure of the appellant, Smith, to file, as required by section 336, Criminal Code, (applying to appeals taken by the defendant in felony cases) a transcript of the record in the clerk's office of this court within sixty days after the trial court's judgment was rendered; and further, that the provisions of section 336 being mandatory, if, as claimed by appellant, his failure to file the transcript within the required sixty days after judgment was because of the inability of the clerk of the circuit court to copy the record within that time, appellant's remedy was to ask of this court an extension of time beyond the sixty days for filing the transcript, which he did not do.

In the instant case, the Commonwealth did not ask of this court an extension of time for filing the transcript of the record in the office of the clerk thereof, and, as it was not filed within the sixty days next after the rendering of the decision or judgment, attempted to be appealed from, we are without jurisdiction to entertain the appeal. Therefore, appellee's motion is sustained, and the appeal is hereby dismissed.



**Breckinridge County v. McDonald, et al.**

(Decided September 19, 1913).

**Appeal from Breckinridge Circuit Court.**

1. **Appeal—Claims Against County—Single Appeal.**—Where a fiscal court allowed forty-two claims against a county by a "blanket" order, and the county appealed to the circuit court by filing a single copy of the order and issuing a summons against the individual claimants, the circuit court properly treated it as a single appeal, and dismissed the appeal against all persons who had claims for sums not exceeding \$25.00, and also properly required the county to elect which one of those claims which were for more than \$25.00, it would prosecute.
2. **Appeal.**—An appeal cannot be prosecuted from a judgment which is not specified in the statement of appeal required by section 739 of the Code of Practice.
3. **Appeal—When Parties Not Before Court On.**—Parties not named as appellees in the statement of appeal required by section 739 of the Civil Code of Practice, are not before the court upon the appeal.
4. **County Health Officer—Board of Health.**—The County Health Officer is the executive officer of the County Board of Health; he acts for it to execute its lawful demands in such matters; his duty is that of oversight and direction more than personal execution.
5. **County Health Officer—Board of Health.**—Under section 2055 of the Kentucky Statutes, it is the duty of the County Health Officer to see that the rules and regulations provided for by law, and the rules and regulations of the State Board of Health, are enforced.
6. **County Board of Health—Discretion of.**—The power to determine what physicians, nurses, guards and attendants are necessary to carry out the rules and regulations provided by law and by the State Board of Health, is left to the discretion of the County Board of Health; the power to fix the compensation of the person so employed is vested in the fiscal court of the county.

JESSE R. ESKRIDGE for appellant.

MOORMAN &amp; BALL for appellees.

**OPINION OF THE COURT BY JUDGE MILLER—Affirming.**

Early in March, 1912, smallpox became epidemic in certain portions of Breckinridge County. It was confined principally to Cloverport, Irvington, Tar Fork and Balltown. On March 7, 1912, the Breckinridge County Board of Health met for the purpose of considering the smallpox situation, and to take steps to control it. The State Board of Health sent its representative,

Dr. W. L. Heizer, to examine and report upon the situation, and he suggested a definite program of procedure to control the epidemic and prevent the further spread of the disease. Dr. John E. Kincheloe was the County Health Officer, and upon his recommendation Dr. E. C. McDonald, the appellee in this action, a practicing physician at Cloverport, was employed by the County Board of Health to carry out the recommendations included in the report of Dr. Heizer to the State Board of Health. Dr. Kincheloe was a practicing physician at Hardinsburg, the county seat, while Cloverport was eleven miles distant, and Irvington and Tar Fork were likewise located at points distant from Hardinsburg. Dr. McDonald took charge of the work and carried it out successfully. He presented his bill to the Fiscal Court for fifty-four days service at \$10 per day, aggregating \$540, which the court allowed. Upon appeal by the county to the circuit court, a retrial was had and Dr. McDonald again recovered a judgment for \$540. From that judgment the county prosecutes this appeal.

The circuit judge made the following findings of law and fact:

"The court finds as a matter of law that it was not the duty of the Health Officer of Breckinridge County to administer treatment to the indigent patients suffering with contagious diseases, but, that it was his duty under the statute to take general superintendence of all contagious diseases and institute quarantines and fumigate premises. The court does not think, however, that any person suffering with a contagious disease becomes, as a matter of law, the patient of the Health Officer, but that the County Board of Health had power under the law to employ, and did employ, another physician to administer treatment to indigent patients.

"The court finds as a matter of fact that the account sued on by the county, allowed by the Fiscal Court to Dr. McDonald, was for his services when acting in the character of physician to indigent patients suffering with smallpox, and that the amount of his charges are reasonable."

The proof supports the finding of fact; indeed, the appellant does not deny that the services were rendered, or that the charges therefor were reasonable.

Preliminary to a consideration of the case upon its merits, we will dispose of a question of practice which has been urged upon us in the brief for appellant.

1. The order of the Fiscal Court which allowed Dr. McDonald's claim was what is called a "blanket" order allowing the claims of forty-two persons ranging from \$2 to George Graham, to \$540 to Dr. McDonald. The order reads as follows:

"The following smallpox claims were presented to the court, and the court being advised, it was moved and seconded that all claims that were properly itemized and 'O. Kd.' by the Health Officer in charge, be allowed; the vote being taken, said motion carried and was made the order of the court, which claims were as follows, to-wit:

"1. Claim of J. D. Babbage for public printing; allowed \_\_\_\_\_ \$21.00"

(Then follow forty-one other claims for different amounts.)

Ten of these claims allowed by the Fiscal Court amounted to more than \$25 each; but, in prosecuting the appeal the county attorney filed one copy of the order of the Fiscal Court, and caused a summons to be issued against eight of the claimants whose claims exceeded \$25. Upon motion, the circuit judge dismissed the appeal as to all claims of \$25 and less, upon the ground that the circuit court had no jurisdiction thereof; and, upon the motion of the remaining claimants, the circuit judge required the county to elect which of said claims embraced in said order it would try upon the appeal, whereupon the county elected to prosecute its appeal from the allowance of McDonald's claim. Thereupon the circuit judge dismissed without prejudice the appeals from the judgment allowing all the other claims; and to that order the county excepted and prayed an appeal to this court. That order was made on the 16th day of the term—the date of the order not being shown by the record. The appeal, however, is not prosecuted from the order just mentioned, but from the subsequent judgment entered on the 22nd day of October, 1912, which passed upon the merits of Dr. McDonald's claim. The two orders are entirely separate and distinct, and have no relation to each other; the first order above referred to being found on page 6 of the record, while the final judgment appealed from as shown by the statement required by section 739 of the Code of Practice, is found on Page 10 of the record. No appeal having been prosecuted from the order of the circuit judge dismissing the appeals and requiring the county to elect as to which appeal it would

prosecute, that order is not before us and cannot be considered.

Moreover, as those claimants are not named as appellees in the statement of appeal required by section 739, they are not before the court upon this appeal. *Brodie v. Parsons*, 23 Ky. L. R., 823, 64 S. W., 426, and the cases there cited.

2. Section 2055 of the Kentucky Statutes provides, in part, as follows:

"The local board shall appoint a competent practicing physician who shall be the health officer of the county and secretary of the board, whose duties shall be to see that the rules and regulations provided for in this act, and the rules and regulations of the State Board of Health are enforced, and who shall hold his office at the pleasure of said board, and he shall receive a salary, the amount of which to be fixed by the fiscal court at the time, or immediately after his election. In no state of case shall said health officer claim or receive from the county any compensation for his services other than the salary fixed by the fiscal court."

By a proper resolution the County Board of Health had fixed the annual salary of Dr. Kincheloe, as County Health Officer and Secretary of the Board, at \$75.00.

The county defends upon the theory that McDonald was employed by the County Board of Health to take general charge of the smallpox epidemic and that the services rendered by him constituted the same service that was incumbent upon Dr. Kincheloe, as the regularly elected Health Officer; that it was Dr. Kincheloe's duty to take personal charge of the smallpox epidemic at Cloverport, Irvington, Tar Fork and Balltown, and that neither the County Board of Health nor the Fiscal Court had the right to employ or pay a substitute to do the work of the County Health Officer. It will be noticed that the circuit judge in his findings of fact, concludes that it was not the duty of the County Health Officer to administer treatment to patients suffering with contagious diseases, but that it was his duty only, under the statute, to take general superintendence of all contagious diseases, and to institute quarantine, and fumigate premises; and that the County Board of Health had power, under the law, to employ another physician to personally administer the treatment to patients. The proof further shows that by reason of the character of the disease, and the location of the patients at long distances from

Hardinsburg, and from each other, it was impossible for the County Health Officer to give them the requisite personal attention without abandoning his home and practice. Some of these patients were located as far as seventeen miles or more from Hardinsburg. Dr. Kincheloe not only consulted daily with Dr. McDonald by telephone, but he made three visits to Cloverport by way of supervision, spending the entire day there, on each visit. Dr. McDonald was employed by the Board of Health at its meeting on March 2, 1912, but the minute of that meeting is missing. Shortly thereafter, the guards employed by the Health Officer for the purpose of maintaining the quarantine, having threatened to quit work because they feared they would not get their pay, the Fiscal Court entered the following order on April 2, 1912:

"On motion of Justice G. N. Harris, seconded by B. A. Whittenbill, that guards be employed by the Health Officer at a sum not to exceed \$2 per day, and *anything else to stop the spread of the disease*. Motion carried, and is made the order of this court."

Following that order the County Board of Health entered an order on April 12, 1912, which reads, in part, as follows:

"At a special meeting of the Breckinridge County Board of Health called to consider the epidemic of small-pox at Cloverport and vicinity, and in other parts of the county, it is hereby ordered that the recommendations as included in the report of Dr. W. L. Heizer to the State Board of Health be enforced, and that E. C. McDonald, at Cloverport, be authorized as Deputy Health Officer to carry out the said recommendations at Cloverport and vicinity, as follows:

(Then follow six specific instructions as to his duties.)

Under these assurances the guards remained at their posts until the epidemic was finally stamped out.

It is contended by appellant that the order of the Board of Health above quoted, shows that McDonald acted as a deputy in place of Kincheloe, the regular Health Officer, whose duty it was to attend to these matters in person. The wording of the order, however, is not material under the facts, and in no way changes the real relation of Dr. McDonald to the County Health Officer; and, although McDonald was styled a Deputy Health Officer at Cloverport, he was no more than an

employee at Cloverport, because the regular Health Officer could not, by reason of the circumstances above pointed out, give his personal attention to the epidemic at that point.

The whole question, therefore, resolves itself into this proposition: Can the County Board of Health employ agents or assistants for the Health Officer for the purpose of eradicating an epidemic at a distant point in the county, where the circumstances of location and the nature of the disease are such that the County Health Officer could not be expected to give his personal attention thereto in the ordinary course of his business? We think there can be no doubt of the right of the board to so contract.

Appellant relies upon *Hickman v. McMorris*, 149 Ky., 1, as denying that right. A careful reading of the opinion in that case shows, however, that it is not at all controlling in this case. In the *McMorris* case, the County Board of Health had regularly appointed Dr. Scarborough as Health Officer, and he having declined to discharge the duties of his office, the County Board of Health employed Dr. McMorris to perform the same duties, supervisory or otherwise, that the law imposed upon Dr. Scarborough, and thus placed the county in the attitude of paying two men for precisely the same services. Under that state of case this court properly held that there could be but one County Health Officer; it did not hold that the board could not employ the necessary assistants to enable the board and its Health Officer to protect the public health in times of epidemic. The contention of appellant, if sustained, would forbid the Board of Health from employing but one physician in any case, and regardless of the necessities of the case or the amount of work to be done. In this instance Dr. McDonald, at one time, had as many as thirty-six cases in his locality which required his daily personal attention. It was impossible for Dr. Kincheloe to do this work, and supervise the general health affairs of the county at the same time; and we do not believe the statute contemplated that he should have done so.

The clause of section 2055 of the Kentucky Statutes above quoted prescribes that the duties of the County Health Officer "shall be to see that the rules and regulations provided for in this act, and the rules and regulations of the State Board of Health, be enforced." The record shows that Dr. Heizer, acting for the State Board

of Health, was on the ground and had made certain recommendations, and that McDonald was employed to carry out those recommendations. In requiring the County Health Officer "to see that the prescribed rules and regulations are enforced," does not necessarily contemplate that he shall personally do the work. On the contrary, it contemplates rather a medical supervisory service over the employees and assistants of the board.

It was so held in *Trabue v. Todd County*, 125 Ky., 813, where this court said:

"The Health Officer is the executive officer of the local board. He acts for it to execute its lawful demands in such matter. His duty is that of oversight and direction, more than personal execution."

In speaking of the nature and functions of the County Board of Health, in *City of Bardstown v. Nelson County*, 25 Ky. L. R., 1479, 78 S. W., 169, the court said:

"The county boards of health are county officials having duties to perform toward the public within their counties; their compensation is required to be fixed and paid through the fiscal courts of the counties. It was competent for the legislature to create these governmental agencies, and to impose upon them the discharge of certain duties to the State and counties. If the legislature sees proper to have the police laws of the State looking to the preservation of the health of the public, executed by a body of officials selected and chosen with reference alone to their fitness for that delicate and important task, instead of imposing it on the fiscal courts, or town councils, it is clearly within their power to do so. But when they do so, the county board becomes an auxiliary department of the county government. The express authority with which they are clothed by statute carries with it every implied authority necessary to execute it. As they could not execute the statute for the benefit of the county, without incurring a liability to pay it, and as no other means are provided, it follows that the liability must be paid by the county as its other obligations are, by money derived from county taxes, levied by the fiscal court, the only tribunal authorized by statute for levying county taxes."

*Walker v. County of Henderson*, 23 Ky. L. Rep., 1267, 65 S. W., 15, is directly in point. In that case Walker had been employed by the County Board of Health to take charge of the County Pest-house during an epidemic of smallpox, and his admission as superintendent of the

Pest-house was denied him by the committee of the Fiscal Court. Walker sued for compensation for his services pending the litigation between the Fiscal Court and the County Board of Health for the possession of the Pest-house, which had finally resulted in a victory of the County Board of Health. In sustaining Walker's claim, the court said:

"The County Board had authority to resume charge of the epidemic and to employ physicians for the treatment of patients confined in the pest-house. This necessarily involved the power and right to discharge those who had been employed by the Fiscal Court during the interregnum; and it was the duty of the Fiscal Court to make fair and reasonable compensation to the persons so employed whether they approved their employment or not. *The power to determine what physicians, nurses, guards and attendants are necessary is left to the discretion of the Board of Health*, but the power to fix the compensation of the person so employed, like the compensation of the County Boards themselves, is vested in the Fiscal Court of the county."

From these abundant authorities, it is clear that the ordinary duties of the County Health Officer, for which he is paid a yearly salary, are largely executive and supervisory, in seeing that the rules and regulations provided by law, and the rules and regulations of the State Board of Health, are enforced. As was well said by the chancellor, it is his duty under the statute, to take general superintendence of all contagious diseases, and to institute quarantine and fumigate premises; and to carry out these general purposes the County Board of Health has power, under the law, to employ such other physicians, and nurses, guards, and attendants as may be necessary to administer treatment and stamp out the disease. If there should be any doubt about the application of the foregoing rule as a general proposition, certainly there can be no doubt of its application in this case, since the treatment was not only widely extended, but had to be administered at points distant from the county seat where the County Health Officer resided. His compensation was merely nominal, and clearly did not contemplate that he should render the extraordinary services required in this case.

Judgment affirmed.



**Hayes, et al. v. Hayes, et al.**

(Decided September 19, 1913).

**Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).**

1. **Wills—Construction of.**—In the construction of wills the entire instrument must be taken into consideration in order to ascertain the meaning and purpose of the testator; and in construing a devise the word "or" will be changed to "and" when necessary to effectuate the true intention of the testator.
2. **Wills—Construction of.**—The word "heirs" and "their heirs" are technically words of limitation, but when used in wills they will be construed as words of purchase when it sufficiently appears that the term is used to designate a particular person or persons who may stand in that relation at the happening of a certain event, or at a certain period, and not to the whole line of heirs in succession.
3. **Wills—Rules for Interpretation of.**—The three following general rules are deduced from the decisions of the Kentucky Court of Appeals for the interpretation of wills:  
First: Where there is a devise by a father or mother to a son, daughter, or blood relation, in which the language "to him and his children forever" is used, the word "children" has been construed as meaning "heirs," and they take no interest in the property devised;  
Second: In devises to a blood relation and his children, where the word "forever" is not used following the word "children," the children take a fee subject to the life estate of the parent; and  
Third: In devises by a husband to his wife and her children, the children take the fee and the parent the life estate.
4. **Wills—Construction of.**—Other clauses of a will frequently throw light upon the clause submitted for construction, and in such cases the court can be governed by no fixed rule, but must determine by the language used in the will, as a whole, the character of the estate devised.
5. **Wills—Construction of.**—A will which devises all of the testator's property to his wife for life, with remainder to his daughter Alice, "or her heirs," Pauline, John, Elva, Richard, William and Margaret, and in subsequent clauses required the real estate to be held intact until Pauline became twenty-one years of age, when the property should be sold and one-sixth thereof delivered to Pauline, and the remaining five-sixths to be divided among the other five heirs as each attained his majority, Alice took a life estate, with the remainder to her six children in fee.

**CHARLES W. MILNER**, guardian ad litem, and **LOGAN & MILNER** for appellants.

**STANLEY R. WOLF** for appellees.

**OPINION OF THE COURT BY JUDGE MILLER—Reversing.**

John S. Wood died on January 25, 1911, leaving the following will:

"I, John S. Wood, of 36th and Woodland Ave., Parkland, addition of Louisville, Jefferson County, State of Kentucky, being of sound mind and capable of exercising my reasoning faculty and without persuasion from any source whatever, do hereby of my own free will and accord, will and bequeath my estate as follows:

"To my beloved wife, Nancy Jane Wood, all of my property, both personal and real estate, insurance moneys, pension moneys, together with any moneys due me from any source whatever, or that may be found upon my person or premises at the time of my death or thereafter, to keep and enjoy the profits thereof until her death, unless she should remarry in which event the entire estate is to be subject to the same condition as if she had died, which I will now state as follows:

"In the event of the death of my wife, my entire estate is to revert to Alice V. Hayes, who at the time of this writing lives at, or near Eleventh and Chestnut St., this city, or her heirs, Pauline Hall Hayes, age 15 years, Jno. Granton Hayes, age 14 years, Elva Lee Hayes, age 11 years, Richard Edgar Hayes, age 10 years, Wm. Ballard Hayes, age 8 years, and Margaret V. Hayes, age 6 years.

"This real estate property is to be held intact until Pauline Hall Hayes, the eldest heir, is 21 years of age.

"I hereby appoint as my executor, of this will, and trustee of my estate, Geo. Hunt McAllister, of Louisville, Ky., who shall execute a bond which shall be approved.

"He shall have power to collect all moneys due me from any source whatever, pay funeral expenses, and he is further empowered to pay all lawful debts using the balance of my insurance due me from other parties, also to sell such personal effects as cows, hogs, chickens and etc.

"After all debts have been paid he shall invest the balance of the money for the benefit of my wife, Nancy Jane Wood, for her personal use and maintenance.

"My executor is further empowered that after the death of Nancy Jane Wood, and Alice V. Hayes, and when the eldest child, Pauline H. Hayes, becomes 21 years of age, to sell all my property giving to Pauline H. Hayes 1-6 of the estate in cash, putting the remainder of the money on interest to be divided among the other five heirs as each becomes twenty-one years of age."

Alice V. Hayes is the daughter of John S. Wood; and this appeal by the guardian *ad litem* of the infant defendants, who are the children of Alice V. Hayes, presents a controversy between Alice V. Hayes and her children as to their respective rights under said will. The guardian *ad litem* contends that the infants take either a vested remainder in the estate of John S. Wood, or a joint estate with their mother, Alice V. Hayes; while Alice V. Hayes contends that she takes an absolute fee in remainder, subject to the life-estate of the widow, Nancy Jane Wood. The chancellor was of opinion that Alice V. Hayes took a fee simple title upon the death or remarriage of Nancy Jane Wood, if Alice should then be living; otherwise to her children in fee; and from that judgment the infants prosecute this appeal.

The appellants contend that the clause of the will which directs that in the event of the death of the testator's wife his entire estate should go to his daughter, Alice, "or her heirs," naming them, should be read "and her heirs," in order to arrive at the true intention of the testator; and that the word "heirs" when so used, is a word of purchase and not a word of limitation, since it would then sufficiently appear that the term "heirs" was used to distinguish particular persons who might stand in that relation at the happening of a certain event, and not the whole line of heirs in succession. On the other hand, it is contended on behalf of Alice V. Hayes that the words, "or her heirs," as used in the will, are to be considered as words of limitation and not of purchase.

It is an elementary and well established principle of law in the construction of wills that the entire instrument must be taken into consideration in order to ascertain the meaning and purpose of the testator, and in construing a devise the word "or" will be changed to "and" when necessary to effectuate the true intention of the testator. *Williams v. Williams*, 91 Ky., 547.

Counsel for appellants concede that if the testator had provided that upon the termination of the life-estate of his widow the property should revert to "Alice V. Hayes and her heirs," and had made no further provision, there might be an impelling necessity for presuming that the testator used the word "heir" as a word of limitation; but that in mentioning the heirs by name, the presumption is changed since he thereby placed emphasis upon them as the takers under the will and used the

word "heirs" as a secondary term and merely descriptive of and as a substitute for "children," and, therefore, as a word of purchase.

In *Ebey v. Adams*, 135 Ill., 80, 10 L. R. A., 162, the testator, as in the case before us, devised his estate to his widow during her life or widowhood, and upon her death or remarriage, the residuum of the estate, after paying certain specific legacies, was devised to the testator's "children," or "their heirs," to-wit (naming his six children), share and share alike.

In upholding the claim of the children to take as purchasers, the Illinois Supreme Court said:

"The words 'heirs' or 'their heirs' are technically words of limitation; but in this and other cases they are used as words of purchase, and always have that operation when it sufficiently appears that the term is used to designate a particular person, or particular persons, who may stand in that relation at the happening of a certain event, or at a certain period, and not to the whole line of heirs in succession. No one can have heirs while living. The word 'or,' therefore, as here used, indicates substitution; and the payment or distribution is to be made at a fixed period, i. e., upon the sale by the executors, after the termination of the intermediate estate. It would seem clear, therefore, that the persons who are to take are such of the children as might be living at the time of the distribution and the heirs of such as might have predeceased."

In *Wren v. Hynes*, 2 Met., 129, the devise was of certain bank stock to be "equally divided among all my surviving children, or their heirs." It was held that the words "or their heirs" were used, not as words of limitation, but as words of purchase, and that they were intended to operate as an alternative devise or a devise over, in the event that any of the children should die leaving issue, before the period of distribution. The court there further held that extrinsic evidence afforded by other provisions of the will was proper to be considered in arriving at the construction given. See, also, *Robb v. Belt*, 12 B. M., 643.

In *Feltman v. Butts*, 8 Bush, 115, the will read as follows:

"I now give the said lot to my brother, Samuel, during his life, and after his death I will said lot to his heirs."

The court held that the word "heirs" as there used in reference to a living person, as the ancestor, means, in its popular sense, children who are heirs apparent, and that as Samuel had living children at the date of the will, the court should not hesitate to conclude that the testator used the word "heirs" in the instrument in place of and for the word "children."

In *Underwood v. Magruder*, 27 Rep., 1165, 87 S. W., 1046, the devise was to Walter Ellen Magruder for life, with remainder 'to Mary Jane Slemmons and her heirs.' After pointing out that the word "heirs" as generally used is a word of limitation and not of purchase, the court further said:

"It is true that there are a few cases in which the word 'heirs' in a deed or will has been held synonymous with 'children,' but in all these cases the ruling rests upon the ground that there was nothing in the instrument to show that the word was not used in its ordinary sense as a word of limitation, but in the sense of child. There is nothing in the instrument before us to give the word any other than the usual meaning."

In *Naville v. American Machine Co.*, 145 Ky., 344, 349, the court reviewed the cases at some length and deduced therefrom the following general rules of construction:

"From the foregoing we are enabled to divide the decisions of this court, bearing upon the question under consideration, into three general classes: First, devises by a father or mother to a son, daughter, or blood relation, in which the language 'to him and his children forever' is used; second, devises to a blood relation and his children where the word 'forever' is not used following the word 'children;' and third, devises by a husband to his wife and her children. In all those cases falling within the first class the word 'children' has been construed as meaning 'heirs,' and under this construction it has been held that they took no interest in the property devised. In the second class of cases it has been held that the children took a fee, subject to the life estate of their parent. And in the third class of cases the children have been held to take the fee and the parent the life estate, the opinion in the cases falling within this class being rested, as stated, upon the idea that the testator, while wanting his wife to have the full use, benefit and enjoyment of his property during her life, would not want it,

after her death, to pass to those strangers in blood to him."

See also *Dicken v. Dicken*, 151 Ky., 440.

Applying the foregoing rules to the will in the Naville case, where the devise was "to my beloved daughter, Anna Marie Naville (nee Seiler) for her to enjoy for herself and her children forever," that case fell in the first class, Mrs. Naville taking a fee.

Of course, many cases will not come within the scope of either rule announced in the Naville case, but if the words of the devise do so bring it, the case is of easy solution.

By applying the rules to the case at bar where the devise was to the widow for life or widowhood, and after her death or marriage, to the testator's daughter, Alice V. Hayes "or her heirs, Pauline Hall Hayes, Jno. Granton Hayes, Elva Lee Hayes, Richard Edgar Hayes, Wm. Ballard Hayes and Margaret V. Hayes," we find that while it does not fall squarely within any one of the three rules, it is in effect a case of the second class, where Alice V. Hayes would take a life estate, with remainder to her six children in fee. This construction must be given to this will upon the words of devise, and without any assistance from other clauses of the will, since it is clear beyond question that the word "heirs," as here used, means the children named. The devise being therefore, in effect, to Alice V. Hayes and her children, it falls within the second class, and the children take the fee subject to the life estates.

But if there should be any doubt of this conclusion reached from a consideration of the devising clause alone, it will be readily removed by a consideration of the other clauses of the will. Those cases in which the construction usually given to a devising clause is changed by some other clause of the will are not infrequent, and may be said to constitute a fourth general class.

The court had this class of cases in mind when it used the following language in the Naville case, *supra*:

"Of course, in the multiplicity of suits involving the construction of wills, many cases will be found that are not properly assignable to any of these classes. Other clauses in the will frequently throw some light upon the clause submitted for construction, and in such cases the court can be governed by no fixed rule, but must determine from the language used in the will as a whole the character of estate devised.

"In *Webb & Harris v. Holmes*, 3 Ben Mon., 404, the devise was to the mother and her children forever, but because of other language in the will showing an intent on the part of the testator that the mother should take only a life estate and the children the remainder, the court so decided. But in the absence of this other language, which exercised a controlling influence in the construction of that will, it would undoubtedly have been held to fall within the first class. *Smith v. Smith*, 119 Ky., 899, and *Harkness v. Lyle*, 132 Ky., 767, also illustrate this principle."

Looking to the other provisions of the will of John S. Wood, we find a clause in which he directs his real property "to be held intact until Pauline Hall Hayes, the eldest heir, is 21 years of age." She was then fifteen. Moreover, he speaks of her as "the eldest heir," of her mother, meaning evidently to speak of her as the eldest child of her mother. Again, the executor is directed to hold the residuum of his estate intact for the benefit of the widow for life, and is not to be sold until after the death of both widow and Alice V. Hayes, "and when the eldest child, Pauline H. Hayes, becomes 21 years of age." If it had been intended that Mrs. Hayes should take the fee, for what possible purpose was the real estate to be held together, not only during her life, but until her "heir" Pauline should attain her majority? In a subsequent clause the executor is directed to sell all the property when the eldest "child" Pauline becomes of age. Furthermore, why was the remaining five-sixths of the estate directed to be held "on interest to be divided among the other five heirs, as each becomes twenty-one years of age," if the testator had intended that their mother should take the fee, in all probability many years before the younger children could reach their majority?

In short, the will gives the fee in remainder to the six children of Alice V. Hayes, by name, calling them her "heirs," and directs it to be held in trust until Pauline, the eldest "child," becomes twenty-one years of age, when she is to receive her share, and the other five children, again called heirs are to receive their several shares as each becomes 21 years of age. The conclusion is irresistible that the testator used the term "heirs" synonymously with "children," and that he intended the infant appellants, who were his grandchildren, should take the fee after the termination of the two life estates.

Appellee relies upon *Underwood v. Magruder*, 27 Ky. L. R., 1165, 87 S. W., 1076, above cited; *Childers v. Logan*, 23 Ky. L. R., 1239, 66 S. W., 124; *Hazelwood v. Webster*, 25 Ky. L. R., 1388, 78 S. W., 123; *Dotson v. Kentland Coke & Coal Co.*, 150 Ky., 60, and *Edwards v. Cave*, 150 Ky., 272, to sustain the judgment of the chancellor. An examination of these cases will show that none of them is inconsistent in principle with the conclusion here reached.

*Underwood v. Magruder* has been heretofore considered and needs no further comment.

In *Childers v. Logan* the devise was to the wife for life, with remainder as follows:

"I will that at the death of my wife, that my daughter Addy, and her children, and Charley, my son, and his children, have a homestead and cottage, together with the twenty acres of land."

The question was, what interest was taken by the daughter Addy, and the son Charley, in the twenty acres? These words, when taken alone, bring this devise squarely within the second rule laid down in the *Naville* case—the devise being to blood relations and their "children"—where the children of Addy and Charley would ordinarily have taken the fee subject to the life estate of their parents. But in reading in connection with this clause, another clause in which the testator gave to "Addy and her children, and Charley and his children, \$5,000, the money to be invested in bank stock until they are 25 years of age," the court was forced to give the same meaning to both clauses; and, as the \$5,000 was evidently given to Addy and Charley absolutely, although their children were nominally joined in the gift, it followed that the devise of 20 acres under precisely the same terms, must be given the same effect. This was a case of the fourth class, where a different clause of the will showed that the words "their children" were used in the sense of "their heirs," and were words of inheritance and not of purchase, thus giving the fee to the first takers.

In closing the opinion, the court said:

"If the testator had simply used the word children in the manner in which they were used in the clause of the will by which he devised the twenty acres of land, we would be very much inclined to hold that he used them as words of purchase. But it is so evident that he used the word "children" in the sense of "heirs" in the de-



wise of the \$5,000, that we must conclude that he intended to use them in exactly the same sense in the devise of the twenty acres of land."

In *Hazelwood v. Webster* the devise was to "my above-named children—and their heirs forever." From a reading of the entire will, and the changes made by the codicil, the court came to the conclusion that the testator really intended to invest his children with the absolute fee, thus likewise bringing that case within the fourth class.

In *Dotson v. Kentland Coal & Coke Co.*, the grant was to "Daniel B. Smith and Lydia Smith, bodily heirs, Mary B. Smith and their heirs."

The court said:

"Unless there is something in the deed in question, showing that the words 'bodily heirs' were used in the sense of children, or as words of purchase, they must be treated as having been used by the grantors, in their technical sense, as words of limitation; and the effect of such words, so used, is to create an estate tail, which has been by statute, section 2343, converted into a fee. *Handy v. Harris*, 32 Rep., 224; *Lawson v. Todd*, 129 Ky., 132; *Pelphrey v. Williams*, 142 Ky., 485.

"A familiar rule of construction is, that, where the language used is so ambiguous and uncertain that it cannot, with satisfaction, be determined what estate the grantor intended to convey, that construction will be adopted which passes the fee, rather than a less estate, for the law favors the vesting of estates. *Moore v. Sleet*, 113 Ky., 600; *Baxter v. Bryan*, 123 Ky., 235; *Tanner v. Ellis*, 127 S. W., 995. \* \* \*

"We are unable to tell what estate the grantor intended to convey, and we, therefore, give to the words used their strict legal significance and hold that, under said conveyance, the fee simple title passed to Daniel B. and Lydia Smith, and, by their conveyance to appellee, through Bright, trustee, appellee is the owner of the fee simple title to said property."

In *Edwards v. Cave*, the grant was to Josie E. Edwards and her children now born, and all children that might thereafter be born to her, and the question was, what interest did the children of Josie E. Edwards take?

Speaking of the will, the court said:

"Considered alone, the language used in the caption would justify the holding that Josie E. Edwards took the fee. There is language in the granting clause that

would justify that construction which would give to Josie E. a life estate, with remainder to her children; and the language used in the habendum is susceptible of a construction that would give to the parties a joint estate. Here then, we have a case where, upon consideration of the instrument as a whole, the mind is in doubt as to what estate was intended to be conveyed, and that construction will be adopted which passes the fee. *Dotson v. Kentland Coal & Coke Co.*, 150 Ky., 60, and authorities there cited. To our mind, this will, no doubt, more nearly effectuate the real intention of the parties than any other construction. The grantor was the great-aunt of the grantee, Josie Edwards. It was her purpose to provide her niece a home, in which she could suitably care for and rear her children."

It will thus be seen that the cases relied upon by appellees are not in conflict with the general rules first announced, and under which we have concluded that Alice V. Hayes takes only a life estate with remainder to her children in fee.

The judgment of the chancellor will have to be reversed, with instructions to set it aside and enter a judgment as above indicated.

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### **Salings v. Commonwealth.**

(Decided September 23, 1913).

#### **Appeal from Edmonson Circuit Court.**

1. Intoxicating Liquors.—Where facts are shown from which the jury may infer that the defendant sold the whiskey to the witness, a conviction will be sustained, although the defendant, himself, testified that he did not sell it, and had no interest in it.
2. Intoxicating Liquors—Instructions.—An instruction telling the jury that if they believed from the evidence beyond a reasonable doubt that the transaction detailed by the witnesses was a scheme or device to evade the local option law, was not misleading or improper.

N. T. HOWARD and JOHNSON & JOHNSON for appellant.

JAMES GARNETT, Attorney General; OVERTON S. HOGAN, Assistant Attorney General for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

Bob Salings was indicted in Edmonson County, charged with violating the local option law by selling whiskey to Miles Duvall and Rance Merideth. On a trial of the case he was found guilty and judgment having been entered upon the verdict, he appeals.

The chief complaint made on the appeal is that the evidence does not warrant the submission of the case to the jury, and is insufficient to sustain the verdict. The testimony given on the trial is as follows:

Miles Duvall, as a witness for the Commonwealth, testified:

"Some time about a year ago I heard there was some moonshine whiskey over on Nolin River and Rance Merideth and I went over there—it was some four or five miles from my home. It was night, maybe 9, 10 or 12 o'clock when we got there. Several men there, Tom Po-teet, George Brooks, Jim Loller and Bob Salings and maybe others. There was a keg of whiskey and a dim light. Did not know whose whiskey it was nor who lived there. Bob Salings helped draw and measure the whiskey. Don't know how much I got nor how much I paid for it. I think I got three quarts. I don't know what size jug. I placed the money on head of keg and a small boy got it. Don't know whose whiskey it was."

Cross-examined:

"I don't know whose whiskey it was—it was in the woods. I helped Salings draw some whiskey for himself after he drew mine. I left and went home."

Rance Merideth, called as a witness for the Commonwealth, testified:

"Went with Miles Duvall to get the whiskey. There were several men there—don't remember all of them—no one there would sell the whiskey. Bob Salings and Miles Duvall took the keg of whiskey and carried it up on the hill and Duvall came back with the jug of whiskey—my quart was in Miles' jug—I had given Miles the money for a quart. I did not go upon the hill where it was drawn out. It was in Edmonson County and in 1911."

The defendant testified as follows:

"I was there on the night in question, helped Duvall draw his whiskey and got some myself, and Duvall helped me draw mine, and I put my money on the head of the

keg. It was not my whiskey and I had no interest in the sale to Duvall and Merideth and got no part of the money. I think it was early in the night. I understood that the whiskey belonged to Elias Jack Merideth. A lantern was there."

Cross-examined:

"I live close by—I am a son-in-law of Bill Poteet—I don't know whose land—Bill Poteet has lease of land but I don't know just where the line is—Elias Jack Merideth had a 'still' close by. I may have been there once before—I did not have Government license at that time, but I paid for Government license since that time. (Defendant objected to question as to Government license being obtained since. Court overruled the objection and defendant excepted.) I paid for Government license last July but have not got them."

"Was asked to tell circumstances under which he paid for license to which Commonwealth excepted. Witness stated that he was tried in Bowling Green in Federal Court on same charge and in a compromise with the attorney for the Government by which he was acquitted of the charge, the attorney for the Government suggested that he had better take government license and he thereupon paid for said license."

On this evidence the court in substance instructed the jury (1) that if they believed from the evidence beyond a reasonable doubt that Bob Salings sold the whiskey to Miles Duvall and Rance Merideth, they should find him guilty; (2) that if they believed from the evidence beyond a reasonable doubt that the transaction detailed by the witnesses were a mere trick or scheme by which to evade the law against the sale of liquor, they should find the defendant guilty; (3) that if they had reasonable doubt from all the evidence as to his being proven guilty, they should acquit him.

The evidence showed beyond question that somebody sold the whiskey to Duvall and Merideth. If the evidence of the two witnesses for the Commonwealth alone is considered, it is pretty clear that the case was made out; for Salings himself helped draw and measure the whiskey. He helped to carry the keg up on the hill. Duvall, who also helped carry the keg up on the hill, from his evidence, went there to buy whiskey, and when he had gotten what he wanted, he placed the money on the head of the keg, and a small boy got it. What the boy did with the money is not shown. On this evidence the jury had

a right to infer that Salings was selling the whiskey to Duvall, and that the taking of the whiskey upon the hill, and leaving the money on the head of the keg, was only a device to conceal the real nature of the transaction.

It is true that Salings himself testified that he helped Duvall draw his whiskey, and got some himself; that Duvall heped him draw his, and he put his money on the head of the keg. But it will be observed that he is not sustained in the latter statement by Duvall. The credibility of the witnesses was for the jury. They had a right to infer from the facts, if they did not believe Salings' testimony, that he was selling the whiskey to Duvall. The jury knew the witnesses and we cannot say that their verdict is palpably against the evidence.

The defendant was not prejudiced substantially by the instructions. Many tricks and devices are resorted to by those who sell whiskey, to conceal the real transaction. The transaction detailed by the witnesses was simply the transaction in which Duvall got the whiskey. He had this transaction alone with Salings and so the instruction could have referred only to Salings' conduct in that transaction.

The owner of whiskey would not set it out on the hillside and leave it there for any one who wanted some to help himself and pay for it or not, as he saw fit. The large profit that is made on the illegal traffic in whiskey in local option districts, is the reason that men engage in the business, and so they are sure to see that when the whiskey goes, the money is forthcoming. The risk of detection causes them to adopt many devices to hide the transaction. A very common device is the pretence that the whiskey is procured for another as an accommodation, the purchaser in fact dealing only with the pretended agent who takes the money, and goes off and brings back the whiskey. The jury here had a right to infer that Salings was preparing to defend himself, if charged with selling the whiskey, by drawing some for himself. Nobody else made any arrangement with Duvall. Salings does not explain why he took the whiskey himself, or how he knew that he might draw any of it, or why he acted as he did in regard to the whiskey. From these facts the jury were warranted in inferring that he was really the party who was selling the whiskey, and that the transaction as detailed by the witnesses was simply a device to conceal the illegal sale of the whiskey.

Judgment affirmed.

**Johnson v. Commonwealth.**

(Decided September 23, 1913).

**Appeal from Graves Circuit Court.**

1. **Verdict**—When Will Not Be Disturbed in Criminal Case.—The verdict of a jury will not be disturbed in a criminal case, unless palpably against the evidence.
2. **Larceny—Horse Stealing—Verdict.**—Proof showing that the defendant was present when the horse was stolen and carried away; that he assisted in disposing of the property, and claimed a half interest in the horse, a verdict finding him guilty, will not be disturbed, his own explanation of the circumstances not being satisfactory.
3. **Larceny—Horse Stealing—Carrying to Another County—Jurisdiction.**—If a horse is stolen in one county and carried to another, the thief may be prosecuted in either county for larceny, as there is a new asportation in each county to which the stolen property is carried.

W. S. FOY, B. C. SEAY for appellant.

JAMES GARNETT, Attorney General; O. S. HOGAN, Assistant Attorney General, for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Affirming.**

Chester Johnson and Ed. Johnson were indicted in the Graves Circuit Court, charged with stealing a horse, the property of R. Pate, in Graves County. The defendants demanded a separate trial. Ed. Johnson was tried and convicted; after this Chester Johnson was tried and also found guilty. Judgment having been entered upon the verdict, he appeals.

The ground chiefly relied on for reversal is that the verdict is against the evidence. The facts are these: Richard Pate, the owner of the horse, was at the house of a man named Moore, in Hickman County, and had put his horse in the stable on Sunday evening before the third Monday in November, 1911. After dark he took his horse out of the stable and hitched it at the gate while he went in the house to warm. When he came out of the house the horse was gone. Several days afterward he found his horse in the possession of a man named Hornsley, in Mayfield, Kentucky. On Monday morning Ed. Johnson was seen riding the horse toward Mayfield, and after he reached Mayfield he traded the horse to Hornsley for a roan mare, about noon. That afternoon Ches-

ter Johnson had the roan mare and traded her to another. That evening Chester Johnson, Ed. Johnson and Chester Johnson's father-in-law, went home from Mayfield in the same buggy. As Chester Johnson went into Mayfield that morning he proposed a horse swap to a man named Cash, and finally said to Cash that he was going to have a horse up in town to trade. Cash afterwards saw him in town riding the roan mare, and asked him where he got the mare. He said his cousin, Edgar Johnson, had a weak-eyed horse and traded him for the mare; that he got a half interest in the horse. After this he told Cash that he bought the horse at a sale. The Commonwealth also proved by several witnesses that Ed. Johnson and Chester Johnson who lived ten or twelve miles from Moore, were seen in that neighborhood the evening the horse was missing, driving in that direction, and that they were also seen about two o'clock in the morning coming back from there. On the other hand, Chester Johnson testified that he was at the home of his father-in-law on that night; and by his mother-in-law he proved the same fact. But his testimony as to how he got in possession of the roan mare and as to the trades he made on that Monday in Mayfield is very unsatisfactory. He testified that he bought a horse there from a liveryman who lived at Fulton, and traded this horse for the roan mare. He was unable to give the name of the man he bought the horse from, and though he had been to Fulton several times, he had never talked to the liveryman about selling the horse, and did not have him at the trial as a witness. He and Ed. Johnson were cousins and he went to Mayfield that morning in a buggy which he borrowed from his aunt, Ed. Johnson's mother. In view of the unsatisfactory evidence of the defendant as to how he came in possession of the roan mare, the weight of the evidence showing that he and Ed. Johnson were in the neighborhood of Moore's the night before, the absence of any reasonable explanation of their conduct, and the apparent fact that he and Ed. Johnson seemed to be proceeding under a common understanding on the Monday at Mayfield when the different trades referred to were made, we cannot say the conclusion of the jury was unwarranted. We only disturb the finding of a jury in a case like this where it is palpably against the evidence.

The court instructed the jury that if they believed from the evidence beyond a reasonable doubt that the

defendant, Chester Johnson feloniously stole the horse in Hickman County and then brought it to Graves County with the felonious intent to convert it to his own use, and to deprive Pate of his property therein permanently, they should find him guilty as charged in the indictment. Appellant complains of this instruction because, as he insists, it allowed the jury to convict him in Graves County for stealing the horse in Hickman County; but the instruction does not warrant this conclusion. If a man steals a horse in one county and carries him into another, it is a fresh asportation in the second county, and he may be indicted for the larceny in either county. (Ferrill v. Commonwealth, 1 Duv., 154, Massie v. Commonwealth, 90 Ky., 485; Thomas v. Commonwealth, 12 R., 903.) This is what the court in effect told the jury. In order to convict the defendant under the instruction the jury had to believe beyond a reasonable doubt that the defendant stole the horse in Hickman County, and after so stealing it, brought it to Graves County with the felonious intention of converting it to his own use. The evidence leaves no doubt that the horse was stolen and brought to Graves County. The only material question in the case was whether the defendant was a participant in the crime, and this question was fairly and fully submitted to the jury.

Judgment affirmed.

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### Thrasher & Gunther v. Emke.

(Decided September 23, 1913).

Appeal from Kenton Circuit Court  
(Criminal Common Law and Equity Division).

1. Master and Servant—Injury to Servant by Explosion.—In an action by a servant against the master for injuries received by the explosion of a metal cap while at work receiving and disposing of refuse and debris from a tunnel, the master knowing the refuse was likely to have in it one or more caps or exploders, a thing inherently dangerous, it was his duty to warn the servant of the danger, and this is true even if the master was not responsible for the presence of the caps, and by the exercise of utmost care could not have kept them out. Appellee testified that he did not know of the presence of the cap, or of the probability that it would be hauled out with the muck, and that he had never been warned of such danger. He had only been at work a short time.



his story is not unreasonable and the jury had a right to believe him. While there was a conflict upon this point, there is no ground for appellant's request for a peremptory instruction.

2. Master and Servant—Injury to Servant by Explosion—Instructions—Negligence.—It is sufficient if the employers knew, or by the exercise of ordinary care could have known, of the danger of caps or exploders getting into the refuse, and negligently failed to keep them out, or if the servant was ignorant of the danger, and by the exercise of ordinary care could not have discovered it, and appellants failed to warn him. The contention that the court in its instructions failed to require the jury, as a prerequisite for finding for plaintiff, to believe he knew, or could by the exercise of ordinary care have known of the presence of the explosion is not the question here.
3. Master and Servant—Negligence—Instructions.—The question of appellants' negligence in permitting the caps to be in the muck, and of appellee's knowledge of the danger were fairly submitted to the jury.

WALTER S. ROBERTS, ROBERT C. SIMMONS for appellant.

B. F. GRAZIANI for appellee.

#### OPINION OF THE COURT BY JUDGE NUNN—Affirming.

Appellee, Emke, recovered a verdict for \$1,000 against appellants for the loss of an eye and other minor injuries caused by the explosion of a metal cap or dynamite exploder inadvertently placed by him on a fire which was burning on a dumping ground or fill where appellee was working for appellants.

Appellants were contractors engaged in widening a railroad tunnel in the city of Covington, and had been carrying on this work for more than a year prior to the time Emke was injured. In order to loosen the slate and rock forming the side of the tunnel, blasting was necessary. Holes to the number of eight or a dozen were drilled in the wall, and after being charged with dynamite were fired simultaneously by connecting with an electric battery or current. These exploders are made and used for the special purpose of firing blasts with electricity. The exploder consists of two insulated threadlike copper wires from four to ten feet long, the length depending upon the depth of the drill hole in which it is to be used; one end of these wires hangs out the end of the drill hole, and is connected with the main electric wire; the other end is sealed into a small copper cylinder, about an inch and one-half long, and as big around as a lead pencil. This copper cylinder contains

a very high power explosive, and of sufficient strength to explode the dynamite charge in which it is inserted at the bottom of the drill hole. From its very nature it is a highly dangerous thing, and for safety it must be handled understandingly. When the holes are drilled in the rock a workman loads them with a stick or sticks of dynamite, in one of which the cylinder end of the exploder is inserted. When the workmen are at safe distance, all the holes are fired at once from the battery.

The appellee, Emke, was in the employ of appellants, and had been for ten or fifteen days before the accident. His place of work was on the dump pile where the rock and refuse from the tunnel were hauled by the teamsters as the work progressed. This material is called "muck" by the witnesses. He alternated with another workman, Doherty, in day and night shifts on this dump. His duty was to use a shovel in leveling off the piles of muck hauled from the tunnel by the wagons, and to keep it in shape for those that followed. At the time Emke commenced work with appellants it was cold weather, and a fire was kept burning near the edge of the dump, and by which the dumpmen were protected from the cold. This fire had been there day and night for weeks before he began work, and continued until the accident, at least. The fire was kept alive by Emke and Doherty, and for this purpose they used wood, wedges, and other inflammable material brought to the dump from the tunnel along with the muck hauled by the wagons. Emke alleges and swears that he was told by his superiors to do this, and that it was a part of his duty. At all events both Emke and Doherty were so burning this material with the knowledge and consent of their superiors, and it is also admitted that these superiors directed that the trees in the way of the dump pile, as it formed, should be cut and burned, and they were burned at this fire.

On the day mentioned, a dynamite cap or exploder got into the fire. Emke claims that shortly after he began work on this morning he was gathering up with his shovel inflammable material and throwing it on the fire. There was a cap in it, but Emke says he only saw and knew of it as it left his shovel. The cap immediately exploded and inflicted the injuries named. He states that he did not know of the presence of the cap, or of the probability that any would be hauled out to him with the muck, and that he had never been warned by any one of such a danger.

That this exploder came out of the tunnel with the muck is not disputed. How or why it should get in there is a question. It is not pretended that Emke was responsible for its presence. The appellants insist that they are not responsible because the utmost amount of care they were able to exercise could not keep these caps from being carried out with the muck sometimes. And to this end they offer proof to explain that occasionally a part of the blasts connected with the battery would not go off; that in such cases they would reconnect the missed holes, and if that failed to fire an employee would take out of the drilled hole the cap and dynamite, that is, unload the hole and charge it with another cap and dynamite. But if that employee left in the tunnel, to get mixed with the rock from the shots, this cap taken from the hole, he was guilty of negligence for which the employer should answer. Appellants also explain that certain sections of the wall drilled might fall before the cap and dynamite charge in it were exploded, and that this might occur from concussion of the other shots connected with the battery at the same time, and in this way unexploded caps might get in the muck. Now this might occur if it be supposed that appellants were going to the expense of drilling and blasting rock already so loose that it would fall by picking or of its own weight, or if it could be supposed that there was a moments difference between the time of shots fired simultaneously, that is, divide the time of an electric shock into periods. However, the most likely source of caps in the muck is not mentioned. The carelessness of the loader, carrying with him into the tunnel a bundle or box of them, laying them down as he takes out one at each hole to load it, will, in all probability, account for most of the live caps going out with the muck. That this thing of live caps going out with the muck was a likely occurrence, and a grave danger is admitted by appellant Thrasher and his foremen Jones and Hudson.

But it does not matter so much in just what manner they would get in the muck. Here we have an employee receiving and disposing of all the refuse and debris from the tunnel. Some of it he threw over the dump, and some of it he burned. This refuse and debris was likely to have in it one or more of these caps or exploders—a thing inherently dangerous, whether thrown over the dump or burned in the fire. His employers knew of this dangerous probability, and they owed to the employee on

the dump a duty—the duty of warning him of it, and this is true even if they were not responsible for their presence, and by the exercise of utmost care could not have kept them out.

Appellants say that Emke knew of this danger, and that they warned him of it. Emke denies it, and says he knew nothing of such a danger. Considering the short period of his employment, and the fact that his work had nothing to do with explosives, or the tunnel excavation, his story is not an unreasonable one, and the jury had a right to believe him. Anyhow, there was a conflict in the evidence on this point, and there is, therefore, no ground for appellant's request for a peremptory instruction.

Appellant's other complaint is that the court in its instructions failed to require the jury, as a prerequisite to finding for Emke, to believe that appellant knew, or by the exercise of ordinary care could have known of the presence of *this explosive* on the dump or in the muck. That is not the question here, nor the law of this case. It is sufficient if they knew, or by the exercise of ordinary care could have known of the danger of caps or exploders getting into the muck, and negligently failed to keep them out; or if Emke was ignorant of the danger, and by the exercise of ordinary care could not have discovered it, and the appellants negligently failed to warn him. As above shown, appellants admit they knew of the danger. The remaining questions of appellant's negligence in permitting them to be in the muck, and of Emke's knowledge of the danger were fairly submitted to the jury.

The verdict of the jury is not excessive, and we see from the record no prejudicial error to appellants. The judgment of the lower court is, therefore, affirmed.

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### Jones, et al. v. J. E. Cassidy, Mayor, et al.

(Decided September 23, 1913).

#### Appeal from Fayette Circuit Court.

1. Commission Form of Government Act—Continuation of Employment of Persons Holding Under Former Government—Resolution—Construction of Act.—Following the election of November, 1912, when the City of Lexington voted to adopt the Commission form

of Government, on January 6, 1913, at their first meeting, the Board of Commissioners resolved to continue in employment all persons who held under the former government and at the same salary. To an action by certain taxpayers of the city attacking the validity of the resolution and seeking to restrain the payment of such salaries, the lower court sustained a demurrer and refused to issue any restraining order. Held, it must be presumed that all officers and servants of the city under the former administration were duly appointed, and were acting and receiving compensation by virtue of ordinances regularly enacted by rightful authority. There is nothing inconsistent with the Act of 1910, if they shall continue to serve the city until their term of service expires, unless the Act ipso facto discharges them, and there is nothing in the act that can be so construed unless it is section 4, and it clearly refers to elective officers, and affects only the office. Its purpose was to change the tenure of the office, and not the term of the officer.

2. Commission Form of Government Act—Resolution by Commissioners Providing for Continuance of Employees.—The resolution was merely a declaration or affirmation of the effect of the old ordinances still in force, and was unnecessary, for under the old ordinances and resolutions these former servants continue in the employ of the city, and at the same salary, as agents, not officers, until the laws and ordinances affecting their employment or appointment theretofore in force are altered or repealed by the Commissioners.

J. A. EDGE for appellants.

JAMES G. DENNY for appellees.

#### OPINION OF THE COURT BY JUDGE NUNN—Affirming.

At the November, 1911, election the people of the city of Lexington voted to go under the Commission Form of Government, as permitted by chapter 50 of the Acts of the 1910 Legislature.

On January 6, 1913, at their first meeting, the Board of Commissioners, by a majority vote, on motion resolved to continue in employment all persons who held under the former government, and at the same salary, or compensation.

The appellants, taxpayers of the city, filed this action attacking the validity of the resolution so passed by the commissioners, and denying the right of any such officials or employees to any salary or compensation thereunder, and sought to restrain the commissioners and the city treasurer from paying them. Except the elective officers named in section 4 of the act, and those whose

offices were not abolished until the term of the encumbent expired, it will be seen that the action involved the entire administrative force of the city.

The lower court sustained a demurrer to the petition, and refused to issue any restraining order. Had the court granted the relief prayed for its effect would be to leave the city without a fire department, or any police, sanitary, engineering, auditing, clerical or other servants or employees. In fact the city government would have been a mere form, or framework, ineffective, and unserviceable. We are asked to review the case and say that the rulings of the lower court were erroneous.

The sections of the act, pertinent to the inquiry, are as follows:

2. All laws applicable to and governing cities of the second class and not inconsistent with the provisions of this act, shall continue to apply to and govern each city that may organize under this act. And all by-laws, ordinances, and resolutions in force in any such city, and not inconsistent with the provisions of this act, shall continue to be in force until altered or repealed in the manner provided for in this act.

4. All the present city offices, save those of mayor and police judge, shall, at the expiration of that year, which shall next follow the year in which said election is held, be *ipso facto* abolished.

14. Every ordinance or resolution ordering the construction or re-construction of any street or sewer, or making or authorizing any contract involving the expenditure of more than one thousand (\$1,000) dollars, or granting any franchise or the right to use or occupy the streets, highways, bridges or public places of the city for any except a merely temporary purpose shall after its introduction and before its adoption remain on file at least one week for public inspection in the completed form in which it shall be put upon its final passage; and no such ordinance or resolution shall go into effect until the expiration of ten days after its passage; except in case of emergency, the public health or safety shall require that it take immediate effect, which fact shall be declared by the unanimous vote of the Board of Commissioners.

19. The Board of Commissioners shall also at its first meeting, or as soon thereafter as may be practicable, appoint all such employees as may be necessary for the proper and efficient conduct of the affairs of the city.

All such employees shall be agents, not officers of the city; and they shall perform such duties, and for such compensation as the Board of Commissioners may by ordinance prescribe. \* \* \*

The time at which city officers were abolished, that is, the expiration of the year following the Commission Government election, referred to in section 4, is January 1, 1913. By section 11, the Commissioners' term of office begins on the first Monday in January following their election, so that in this case they took up the duties of their office on January 6, 1913. If section 4 abolished the *officers* as well as the offices, then there is a lapse here of six days in the city government, and if the employment of agents to take their place is such a contract as section 14 contemplates, involving the expenditure of more than \$1,000, and requiring an ordinance to validate, then, the commissioners failing to vote unanimously that an emergency exists, there is a lapse of twenty-three days in which the city is without power to employ any agents to manage its police, fire, street, and sanitary departments so necessary for the safety of the lives and property of its citizens.

Now it is not disputed that the act empowers and makes it the duty of the Board of Commissioners to appoint all such agents or employees as may be necessary for the proper and efficient conduct of the city, and to fix their duties and compensation. The complaint here is that the board has no power to make the appointments without at the same time fixing their duties and compensation, and the aggregate compensation exceeding \$1,000, it could only be done by ordinance, and, therefore, the resolution adopted by the Commissioners on January 6th, was ineffective. If an ordinance was necessary, then nothing short of the unanimous vote of the commissioners could make it effective before January 23rd, and the petition shows it would be deferred to that date because only a majority could be mustered for the resolution.

It cannot be supposed that the Legislature intended a lapse of six days, or any time in the administrative affairs of the city. On the contrary, the act provides positively against such a peril. Section 2 declares that all by-laws, ordinances and resolutions in force in the city, and all laws of second class cities, not inconsistent with the act, shall continue to be in force until altered or repealed by the commissioners. We must presume that

all officers and servants of the city under the former administration were duly appointed, and were acting and receiving compensation by virtue of ordinances regularly enacted by rightful authority. There is nothing inconsistent with the act of 1910 if they shall continue to serve the city until their term of service expires, or until the laws under which they work be altered or repealed, unless the 1910 act, *ipso facto*, discharges them. There is nothing in the act that can be so construed unless it is section 4. As we have seen, it provides that all present city *offices*, save those of mayor and police judge, shall be *ipso facto* abolished. This clearly refers to elective offices, and affects only the office. As shown by section 19, its purpose was to change the tenure of the office, not the term of the officer. The officer, or person becomes an employee or agent. Instead of having a vested right in his office, his services may be dispensed with, and his agency terminated at the will of the commission, and as they believe the best interests of the city require.

The meeting of the commissioners on January 6th, was the first they could hold under the law, which became effective in the city on January 1st, and we conclude that the resolution then adopted by the commissioners was merely a declaration, or affirmation of the effect of the old ordinance, still in force. The resolution was unnecessary, for under the old ordinances and resolutions these former servants continue in the employ of the city, and at the same salary, as agents, not officers, until the laws and ordinances affecting their employment or appointment, theretofore in force, are altered or repealed by the commissioners.

Appellant's contention is not supported by the letter or the spirit of the Commission Form of Government Act, and the judgment of the lower court is, therefore, affirmed.

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### Jones v. Commonwealth.

(Decided September 23, 1913).

#### Appeal from Butler Circuit Court.

1. Criminal Law—Carnally Knowing an Idiot—Evidence of Idiocy.—In a prosecution for carnally knowing an idiot it is competent for the Commonwealth to prove by the neighbors and acquaintances



- of the female assaulted that she was an idiot, and the evidence of this class of witnesses is also admissible to show that she was not.
2. Criminal Law—Carnally Knowing an Idiot—Instructions.—An instruction was proper that defined an idiot as “a person destitute of mind from birth, or a person of such weak and feeble mind existing from birth as renders her incapable of knowing right from wrong, or knowing, has not, by reason of such mental condition, if any, the will power to resist. And that at the time of the sexual intercourse with defendant, if any there was, she did not, by reason of such mental condition, if any, know that it was wrong, or if she knew that same was wrong, if they believe that by reason of such mental condition, if any, she had not the will power to resist the defendant's solicitation or suggestion that she have sexual intercourse with him, if any such there was, then she was in contemplation of law an idiot.”
  3. Criminal Law—Degrees of Offenses.—Section 263 of the criminal code defines certain offenses that are to be treated as degrees of each other, but this section only applies to the class of offenses mentioned or referred to in it and does not apply to the offense of carnally knowing an idiot.
  4. Criminal Law—Construction of Section 264 of the Code—Adultery Not Included in Carnally Knowing an Idiot.—This section, which provides “that if an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or intention, the offense without the circumstances, or a part only, is included in the offense,” is only applicable when the lesser and the greater offense, or the two offenses, if they be of the same nature, have some relation to or connection with each other. Neither the offense of fornication or adultery is included in the offense of carnally knowing an idiot, as there is no relation or similarity whatever between the two offenses.

W. S. HOLMES for appellant.

E. BRADLEY, J. H. GILLIAM, JAMES GARNETT, Attorney General, and D. O. MYATT, Law Clerk, for appellee.

#### OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The appellant prosecutes this appeal from a judgment of conviction under an indictment charging him with the crime of carnally knowing Fannie Johnson, an idiot. The appellant is an uncle of Fannie Johnson, and it is not denied that he had carnal intercourse with her in 1912, some months after she had been declared an idiot by the judgment of the Butler Circuit Court.

The record in the proceeding in which she was declared an idiot was introduced by the Commonwealth without objection, and it was of course admissible in

evidence. Whether this judgment alone would have been sufficient to establish that Fannie Johnson was an idiot at the time the crime was committed against her person, we do not find it necessary to determine, as there was other evidence of her idiocy. A number of witnesses who lived in the same neighborhood with her and who had known her from infancy, testified that in their opinion she was and always had been an idiot; while other witnesses testified that she was a person of ordinary intelligence. Some question is made as to the competency of her neighbors and acquaintances to give evidence as to her mental deficiency and to express the opinion that she was an idiot, but we think this evidence was clearly admissible.

It is a settled rule in this state in prosecutions where the defense is insanity "that persons who are not experts but by association and observation have had an opportunity to form an opinion as to the sanity of the person may testify to that opinion, giving also the facts upon which the opinion is based, so that the jury may judge for themselves what weight the opinion is entitled to." *Abbott v. Commonwealth*, 107 Ky., 624; *Brown v. Commonwealth*, 14 Bush, 398; *Banks v. Commonwealth*, 145 Ky., 800. As under this rule it is competent for non-expert witnesses to express an opinion based on their personal knowledge as to the sanity of a person, we can perceive no reason why it is not equally permissible to allow witnesses who from personal knowledge of the person under investigation qualify themselves to testify to express the opinion that the person is or is not an idiot.

Indeed the evidence of the class of non-expert witnesses we have referred to is of more assistance to a jury in arriving at the truth as to the general mental condition of a party than the technical evidence of learned medical experts who give their opinions upon a hypothetical statement of facts. Without devoting further attention to this feature of the case, we think it sufficient to say that there was abundant evidence to authorize the jury to find, as they did in returning a verdict of guilty, that Fannie Johnson was an idiot.

There being sufficient evidence to take the case to the jury, the court, after instructing the jury that if they believed beyond a reasonable doubt that Fannie Johnson was an idiot and that the accused had carnal knowledge of her, defined an idiot as follows:

"A person destitute of mind from birth or a person of such weak and feeble mind existing from birth as renders her incapable of knowing right from wrong; or knowing, has not by reason of such mental condition, if any, the will power to resist; and if the jury believe from the evidence beyond a reasonable doubt that Fannie Johnson is a person destitute of mind from birth, or that she is a person of such weak and feeble mind existing from birth as renders her incapable of knowing right from wrong, and that at the time of the sexual intercourse with defendant, if any there was, she did not, by reason of said mental condition, if any, know that it was wrong; or if she knew that same was wrong, if they believe that by reason of such mental condition, if any, she had not the will power to resist the defendant's solicitation or suggestion that she have sexual intercourse with him, if any such there was, then she was in contemplation of law an idiot."

Section 1155 of the Kentucky Statutes, under which the indictment was found, does not describe an idiot, merely providing that "whoever shall unlawfully carnally know a female under the age of sixteen years or an idiot, shall be confined in the penitentiary not less than ten nor more than twenty years;" but in the chapter in the Kentucky Statutes relating to idiots and lunatics, contained in sections 2149-2171, there are numerous provisions relating to the custody and control of the persons and property of idiots and lunatics and an idiot in section 2158 is generally described as a person who has been "destitute of mind from infancy." It is said this statute furnishes the correct definition of an idiot and insisted that the court should have simply told the jury that if they believed Fannie Johnson was destitute of mind from infancy she was an idiot, without describing, as was done in the instruction given, the elements that would constitute her an idiot within the meaning of the statute on which the prosecution was based.

The statute found in sections 2149-2171 contains no reference whatever to prosecutions or penalties for criminally assaulting or having sexual intercourse with an idiot, but is confined entirely to provisions relating to the custody and control of their persons and property, and the description of an idiot contained in this statute was not intended as a controlling rule by which to measure the correctness of instructions given in this class of cases. The context shows that the definition of

an idiot was used in a general way to point out the difference between an idiot and a lunatic, the latter being defined as a person who has lost his mind since his birth; and we think it proper in a prosecution under section 1155 that the court should define for the assistance of the jury an idiot within the meaning of this criminal statute. This statute was intended to protect the person of female idiots from assault, and it was enacted because idiots, on account of their mental deficiency, have not sufficient capacity to understand or appreciate the shame and wrong of unlawful sexual intercourse or to resist the importunities of those who might desire to take advantage of their weakness. The purpose of the statute being to protect females who by reason of mental weakness are incapable of knowing right from wrong, or, if knowing it, have not the power to resist the temptation, the jury in prosecutions under the statute should be advised, as they were by the instructions given, what constitutes idiocy, and we think the instructions fairly and aptly described this affliction.

In *Sandefur v. Commonwealth*, 143 Ky., 755, we said that an idiot might be defined "as a person who has been from birth or infancy deficient in mental capacity and destitute of the ordinary intellectual powers." The instruction in the case before us is more elaborate than the one referred to in the *Sandefur* case, but there is contained in it the idea expressed in that case and the elaboration is not objectionable.

It is further argued that an idiot is a person who has been wholly or totally destitute of mind from birth or infancy, and the jury should have been so told, but in the *Sandefur* case, where the evidence showed, as it does substantially in this case, "that the prosecutrix was virtually destitute of reason and did not have ordinary intellectual powers or sufficient mental capacity to appreciate or understand the shame and wrong of having illicit intercourse, or the will power to resist in any degree the endeavors of any man who might seek to take advantage of her," it was held that "it is not necessary to constitute an idiot in the meaning of the statute or even generally that the person should have been wholly destitute of mind from infancy or totally deficient in intellectual powers."

It is further insisted that the crime of adultery or fornication is a degree of or included in the charge of having carnal knowledge of an idiot, and, therefore, the

jury should have been instructed that if they had a reasonable doubt as to the defendant's guilt as charged in the indictment, but did believe from the evidence that he had sexual intercourse with Fannie Johnson, they should find him guilty of adultery. Section 263 of the Criminal Code defines certain offenses that are to be treated as degrees of each other, but the crime charged against appellant is not mentioned, nor is there any reference to any similar or lesser offense that might constitute a degree of it, and as this section only applies to the class of offenses mentioned or referred to in it, it is clear that it is not applicable to the crime for which appellant was indicted.

It is said, however, that the instruction offered, if not authorized by section 263 was by section 264, which reads:

"If an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or intention, the offense without the circumstances, or with part only, is included in the offense, although that charge may be a felony, and the offense, without the circumstances, a misdemeanor only."

In fornication and adultery the consent of the female is assumed, but in carnally knowing an idiot the crime consists in the fact that the act was committed without her consent, as an idiot is deemed in law incapable of consenting. In one class the offense consists in having sexual intercourse with the consent of the female, and in the other without the consent of the female, and so the essential element of guilt in the two classes of cases is radically different. There is no relation or similarity whatever between the two offenses. Section 264 was intended to be and is only applicable when the lesser and the greater offense, or the two offenses, have some relation to or connection with each other, but the circumstances attending the commission of the offense reduce it to a lesser offense than the one charged or convert it into a related offense, as in *Fenston v. Commonwealth*, 82 Ky., 549, where it was held that carnally knowing an infant under the age of consent was under the section included in the crime of rape.

The judgment is affirmed.

**Samuels v. Commonwealth.**

(Decided September 23, 1913).

**Appeal from Todd Circuit Court.**

1. **Criminal Law—Continuance—When Should Be Granted.**—The defendant is in every case entitled to reasonable time and opportunity to prepare his defense, and if the court fails, upon a proper showing, to allow a continuance for this purpose, it will be grounds for reversal.
2. **Criminal Law—Continuance—Facts Stated.**—A negro on December third killed another negro. On the next day he was indicted, and being unable to employ counsel, the court appointed attorneys to defend him, and set his case for trial on December 9th, when it was tried and his punishment fixed at death. From the time of the homicide until the trial the accused was confined in jail, and the attorneys employed to defend him were busy in court in other cases and had no opportunity to investigate or prepare his defense. Held reversible error to refuse a continuance.

W. B. REEVES, Jr., C. A. DENNY for appellant.

JAMES GARNETT, Attorney General; D. O. Myatt, Law Clerk, for appellee.

**OPINION OF THE COURT BY JUDGE CARROLL—Reversing.**

The appellant, a negro, under an indictment charging him with the murder of Ben Covington, also a negro, was convicted and his punishment fixed at death. On this appeal we are asked in his behalf to reverse the judgment of conviction because the trial court erred in refusing to grant a continuance and in overruling the motion for a new trial asked upon the ground of newly discovered evidence.

Samuels and Covington were farm hands employed by Mr. Coleman, a farmer living some miles from Elkton, the county seat of Todd County. Samuels had been working for him six years and Covington four. The homicide occurred on Tuesday morning, December 3rd, between six and seven o'clock, and except for some words that passed between the deceased and Samuels on the Monday preceding that indicated there was some unfriendly feeling existing between them, there is no intimation in the record that they were not on good terms. They had both lived with and worked for the same man four years without having any open quarrel or difficulty, and yet the facts developed on the trial leave the impres-

sion that there must have been some bad feeling of a serious nature existing between these men.

The negro cook testifies that on Monday while the hands were eating dinner she passed by Samuels "and scratched him on the back of the head, and he says, 'Go way, cook; don't fool with me. I ain't fitten to fool with.' I says to him, 'What's the matter?' I says, 'Have I mistreated you?' and I never said nothing else to him. Directly Ben Covington says, 'Porter, have I mistreated you?' Porter never said anything except 'her name is Polly and your name is Ben Covington,' and that was all that was said, and Porter pushed his chair back and went to the water bucket, and then he came back by the stove and made a cigarette and never said anything to him, and Ben never said anything more to him in the kitchen."

This witness further testified that she kept a shotgun she had borrowed from Mr. Coleman's son, in the cabin occupied by her, which was a short distance from Mr. Coleman's house, and that she had eight loaded shells. That late Monday afternoon she saw the gun in her room, but when she returned to her room after supper the gun and three of the shells were missing, but she did not know who took either the gun or the shells.

Mr. Coleman relates the circumstances of the homicide as follows: "On Tuesday morning about 6:30 I went out to breakfast and I heard a noise in my back yard and I went out to see what it was. When I got there Polly Wilson, my cook, and Ben Covington were in a fuss. \* \* \* Polly said that Ben had taken her gun out of the cabin last night and he won't tell me where it is, and Ben says, 'I didn't,' and Polly called him a liar, and I saw they were gettin pretty mad, and I took hold of her and gave her a little shove and told him to go in the house and dry this up, and as I shoved her toward the house I looked into the kitchen door and I saw Porter Samuels standing in the door, and I turned around and Ben was coming toward the kitchen, and he says, 'You called me a liar and I will whip you if it takes me a hundred years,' and I grabbed him by the arm and says, 'Come here Ben,' and I took him off to one side by the smokehouse and he says, 'Mr. Coleman, they accuse me of taking that gun out of the cabin last night and I didn't do it.' I says, 'Ben, there is something else behind all of this and I want you to tell me,' and by the time I got that out Porter Samuels had walked around the smokehouse and he come up and says to Ben, 'You know you

took that gun out of that cabin. You took it out of there to kill me with,' and Covington says, 'I didn't do anything of the kind. What do I want to kill you for?' Samuels says, 'Didn't we have some words yesterday,' and Ben says, 'Yes, but didn't I ask your pardon for it,' Samuels says, 'Yes, but I saw you last night and I saw you with your gun when you was tipping along by the well.' He says, 'No, I didn't.' He says, 'I have not got nothing against you. We have been here a long time together and I don't want any hard feelings.' They began to talk along and I didn't think either one was mad, and I stepped back a little, thinking it was all over, and heard a lick and then jumped in between them and shoved Porter Samuels back."

He further testified that about that time he saw Ben going out of the yard gate and when he had walked a few steps he fell dead from the effects of a wound in his neck inflicted by Samuels with a butcher knife. Mr. Coleman further testified that the three missing cartridges were found in the pocket of Ben Covington and that after searching the premises for the gun they found it hidden in a cornshock a short distance from a road along which Porter Samuels would have passed on Tuesday in going to and from work, but there was no direct evidence that Covington took the gun from the cabin or hid it in the cornshock, although Porter Samuels in his own behalf testified that on Monday night he discovered the gun had been taken from the room of Polly Wilson and being apprehensive that Covington had taken it for the purpose of killing him, which he said Covington told him on Monday afternoon he intended to do, he was afraid to go to the cabin in which he slept, which was some distance from the house, and stay there all night, and asked Polly Wilson to permit him to stay in her house with a couple of other men who lived there, and that while he was in her house he looked out and saw Covington with the gun in his hand going in the direction of the cabin which he, Samuels, occupied. He further said that the next morning he was in the kitchen and heard the quarrel on the outside between Polly Wilson and Covington, and thinking that Covington might be going to attack him, he got a butcher knife from the table and put it in his pocket and went out for the purpose of telling Mr. Coleman that Covington had a gun after him the night before. He said that when he went to the place where Ben and Mr. Coleman were standing he said, "Ben, you ought not



to tell Mr. Coleman you did not get that gun after me last night." And he said he did not, and I said, "Yes, you did," and he said, "It ain't too late for me to kill you yet," and he put his hand in or toward his pocket, and thinking that he had a pistol in his pocket and was going to kill me, I struck him with the knife one time.

Immediately after Samuels killed Covington Mr. Coleman took him to the jail of Todd County, where he was confined, and on the following day, Dec. 4, Circuit Court being in session, he was indicted and his trial set for December 9. The record shows that Samuels was unable to employ counsel, and on the day the indictment was returned the court appointed the attorneys who appear for appellant on this appeal to represent him. On December 9, when the case was called for trial, Samuels, through his counsel, filed an affidavit for a continuance, in which he set out,

"That he is not ready for trial at the present term of this court because the offense with which he is charged occurred in less than one week ago, and that he was indicted at the present term of this court and has not had an opportunity to employ counsel and to procure the attendance of all of his witnesses at this term of the court, and to make the necessary preparation for his trial:

"That he can prove by various witnesses, the names of all of whom he does not now know, but believes he can procure by the next term of this court, that Ben Covington, the decedent, bore the reputation in the community in which he lived of being a dangerous and violent man, and that he can also prove by various and sundry witnesses, the names of all of whom he does not know, that the said Ben Covington had threatened this affiant's life the day before the killing and at the time he made said threats was armed with a shotgun and watching and looking for this affiant for the purpose of killing him. This affiant states that if given an opportunity he can prove by various witnesses, the names of whom he does not now know, that affiant, at the time of the killing, and at all times prior thereto, bore the reputation in his community of being a peaceable, quiet and law-abiding citizen. He states that said testimony would be material in the trial of this case and that if this case is continued he can procure said testimony at the next term of this court."

And W. B. Reeves, one of the counsel appointed to defend him, also filed his affidavit, setting out that "said

appointment was made on the 4th day of December, 1912, and that since said time he and his co-counsel have been busily engaged in court most all the time and that they have not had an opportunity to investigate and prepare this defendant's defense, but that he believes if this case is continued to the next term of court they will be able to make and prepare a good defense for the defendant. That from what little investigation they had been able to make he believes that it can be proven by various parties that the negro, Ben Covington, who was killed, bore in his community the reputation of being a dangerous and violent man, and that they can prove on the night before the killing that he was armed with a shotgun and lay in wait, and that he threatened and intended to kill the defendant, Porter Samuels.

"He states that he believes they can prove, if given an opportunity, that the defendant, Porter Samuels, at all times bore a good reputation in the community in which he lived, and that he was a peaceful, law-abiding citizen. He states that with such little time for the preparation of this case for trial at this term of court, they cannot secure for the defendant a fair and impartial trial."

The court overruled the motion for a continuance, and on December 9 the trial was commenced and concluded and the verdict of the jury returned on that day, no witnesses appearing or testifying in behalf of appellant except two negro boys who lived on Mr. Coleman's place and whose evidence was not material. On the following day, December 10, a motion for a new trial was filed and overruled, and on the same day the judgment appealed from was rendered.

One of the grounds relied on for a new trial was the error of the court in refusing to grant a continuance and another was based on newly discovered evidence. Accompanying the motion for a new trial was the following affidavit of Mr. Coleman, a witness whose testimony has been referred to:

"The affiant, Thad Coleman, says that on Saturday, December 7, 1912, after a thorough search for the gun that was taken from the cabin of Polly Wilson, on his premises, on the 3rd day of December, 1912, he found same in a cornshock near the road about 20 yards from said road and about 300 yards from where they would have worked, along which the decedent, Ben Covington and Porter Samuels would have traveled in going to

their work on the 3rd day of December, 1912, and that said gun was hidden in said cornshock on the opposite side of said shock from the said road along which said parties would have gone in going to their work, and that the same was unloaded and was wrapped in the overcoat of Ben Covington. That affiant in detailing the facts and circumstances of said killing on the witness stand forgot and failed to mention the fact that said Covington's coat was wrapped around said gun when found, and that so far as he knows the defendant, Porter Samuels, nor his attorneys, knew of the fact that said overcoat was found with said gun, or that they had any opportunity to know said fact."

The record shows, as above stated, that within six days after the crime was committed the accused was tried, convicted and sentenced to be executed, and that during all this time he was confined in jail, and, as shown by the affidavits of the attorneys appointed to defend him, was without opportunity to consult or advise with his counsel, who, on account of other business, were unable to give his case any attention or make any preparation for his defense. Therefore, so far as preparing his case for trial was concerned, or having time or opportunity to do so, he might as well have been tried and convicted on the day the indictment was returned, as between that day and the day on which he was tried he was without means or opportunity to make any preparation whatever for his trial.

We might also add that there seems little use in appointing counsel to represent the accused, however capable they may be, unless they have a reasonable time to consult with their client, study the case and inquire into all the facts and circumstances surrounding it, and be thereby afforded a chance to be of some service to the prisoner whose rights they have undertaken by direction of the court to protect.

The affidavit of Mr. Coleman in support of the motion for a new trial forcibly illustrates the disadvantage under which appellant and his counsel labored in attempting to make any defense, as it is almost certain that this important piece of evidence would have been developed on the trial if the attorneys had been given reasonable time to investigate the case in all of its details. The fact that Covington's coat was wrapped around the shotgun when it was found in the cornshock, furnished practically conclusive evidence, taken in connection with

the cartridges found in his pocket, that he had taken the gun from the cabin of Polly Wilson and concealed it in this shock of corn, although he vigorously denied that he had taken the gun when accused of it by Polly Wilson and Porter Samuels. The circumstances in connection with the taking of the gun and the manner in which it was concealed and the place, which was near a road along which Samuels would pass the next day, also furnish persuasive evidence that Covington intended to do harm to Samuels on the following day. It is very true that the facts and circumstances relating to the gun, if developed on the trial, would not have justified the deed committed by Samuels or warranted the jury in acquitting him, but it is entirely probable that this evidence, in connection with the evidence of the violent and dangerous character of the deceased that it was avowed could be produced, might have influenced the jury to fix a lighter penalty than they did.

But however this may be, or whatever might have been the result of the trial if the evidence noted had been introduced, it seems manifest to us that the appellant was denied the right, to which he was entitled, to have a reasonable time and fair opportunity to prepare and present whatever defense he may have had. It is true the matter of granting a continuance in a criminal case is addressed to the sound discretion of the trial court, but this discretion does not authorize the court to refuse a continuance when the circumstances disclose, as in this case, a condition of affairs showing that justice to the accused entitled him to a postponement of his trial.

We recognize that it is important in the administration of the criminal law that a trial may be had as speedily after the transaction under investigation as a decent regard for the rights of the accused will permit, but it is more important that the trial should be fair than that it should be speedy. The peace and order of society demand that persons charged with crime should be brought to an early trial and if guilty, convicted and punished, but while this is so, the right of the accused to reasonable time and opportunity to prepare and present his defense and establish his innocence, if he can, should not be lost sight of, or the trial conducted in such haste as to deny the accused the right to be heard in his own behalf.

It was said in *Penman v. Commonwealth*, 141 Ky., 660, and may be repeated here, that "Every person accused of crime, however guilty he may be, or whatever the nature of the crime charged against him, is entitled to a fair opportunity to prepare and present his defense. It is not the purpose of the law to deny any person accused of crime of the high privilege of establishing his innocence. And whenever it has appeared to this court that the accused was deprived of a reasonable opportunity to explain away his guilt, or was forced into trial without reasonable opportunity for preparation, we have not failed to grant a new trial. Because, however desirable in the interest of justice a speedy trial may be, it is of much greater importance that the law of the land should be administered in an orderly and deliberate way, so that every person arraigned for crime may have in truth a fair trial."

It is true, as argued for the Commonwealth, that many applications for a continuance are made purely for the purpose of delay and with a view of defeating the ends of justice, but applications like this are generally made by defendants who have the aid of friends and money, and who hope by one of these methods to secure some undue advantage that could not otherwise be obtained. But when, as in this case, the defendant is a poor, ignorant and friendless negro, it is not to be suspected that the application for a postponement, under the circumstances stated, was made with the hope that it would result in any improper advantages or do more than enable him to present in his defense such facts and circumstances as might be procured through the assistance of his counsel from witnesses obtained by the ordinary processes of the law, which would have been placed at his disposal.

Being of the opinion that the record before us discloses facts that entitled the defendant to a postponement of his trial, we think the court committed error in overruling the motion for a continuance. *Smith v. Commonwealth*, 133 Ky., 532.

Wherefore, the judgment is reversed, with directions to grant appellant a new trial.

**Griffin v. Griffin.**

(Decided September 23, 1913).

**Appeal from Boyle Circuit Court.**

1. **Divorce—Alimony.**—While without power to reverse a judgment granting a divorce, this court may review the facts of the case for the purpose of passing on the propriety of the chancellor's action in refusing alimony.
2. **Divorce—Alimony.**—In an action for divorce and alimony, evidence examined, and held that the chancellor erred in refusing to award alimony to the wife.
3. **Divorce—Alimony—Expectancy of Husband May Be Considered.**—Where the husband is the only child and prospective heir of his widowed mother, his expectancy may be taken into consideration in fixing the alimony to which the wife is entitled.
4. **Divorce—Alimony.**—In an action by a wife for divorce and alimony, evidence examined, and alimony fixed at \$500.

**ROBERT HARDING and EMMET PURYEAR** for appellant.**W. J. PRICE** for appellee.**OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER—Reversing.**

Plaintiff, Wadelee Griffin, brought this action against defendant, Fred Griffin, for divorce and alimony. The trial court granted the divorce and awarded her attorneys a fee of \$75, but declined to allow her alimony. Plaintiff appeals.

The record discloses that plaintiff and defendant were married on May 4, 1910, and lived together for a short while. At the time of the marriage plaintiff was a young girl 18 years of age, and lived with her father and mother on a farm. The defendant was about 25 years of age, and was the only son of his mother, who was a widow. He and his mother lived on a farm of about 105 acres a mile or two distant from the home of plaintiff.

According to the evidence for plaintiff, the wedding was announced to take place at the home of her parents at 12 o'clock noon on May 4, 1910. The relatives and friends of the contracting parties assembled with the minister and invited guests, but defendant failed to appear at the appointed hour. He was seen in town in his working clothes about 11 o'clock, a. m. He did not come to the wedding until after he had been called over the

telephone twice by the officiating minister. When he came he was several minutes late. After the ceremony plaintiff and defendant went to Lexington in an automobile, accompanied by her father and Mr. Cecil. On this trip the defendant was cool and non-communicative. The next night they returned to Danville, but defendant made no arrangements to have any one meet them, and it was necessary for them to walk into town, about a mile from the depot. Plaintiff telephoned to her father to come in after them. The couple then went to the home of his mother. From that time on she helped with the cooking and housekeeping for him and his mother. At defendant's home they had employed a pet negro boy about 12 or 14 years of age. At one time this boy, who was romping with plaintiff, touched her or seized her by the arm. Defendant did not resent this indignity, but plaintiff got a yard-stick and severely chastised the boy.

On July 12th defendant wrote the following letter to plaintiff's mother:

"July 12, 1910.

"Dear Mrs. Parks:

"I am very sorry to tell you but Wadelee will have to change if we get along any longer. She is hateful, lazy and lies and deceived me by telling some things before we were married, and tried to turn it off by saying she was joking, and that is a black lie; she had as soon lie as eat and you know how she eats. She don't ever want to go up to your place any more, and did not even get up until after breakfast was ready this morning, and won't get up any morning until very late, if she can possibly make it.

"Now if you, Mrs. Parks, or any of the family can make her act and do like she ought to let me know, and if not I will make some other arrangement.

"P. S.—She brags how she can do up there and she can't do a blessed thing here.

"I can name several young married women that are real housekeepers and homemakers and made the home happy right here in the neighborhood, but Wadelee is anything but a housekeeper. She is best at lieing, that is her best and only talent. Answer what you all can do."

Plaintiff took the letter and delivered it to her mother, who put it away for safe keeping. The next day plaintiff's mother carried plaintiff back to defendant's home, and interviewed defendant's mother in regard to plaintiff's mistreatment by defendant. It further ap-

pears from the testimony of defendant's mother that plaintiff performed her household duties cheerfully and well, and that defendant's mother had no fault to find with her. In the month of September, following, defendant again sent plaintiff home. Subsequently he wrote to her the following letter:

"Wadelee:

"Here is the rig, if you wish to come to h—, and if you are having a good time and satisfied all right. Have been very sick since Sunday morning. Am a little better today.

"FRED."

There is further evidence to the effect that defendant would become angry with plaintiff when plaintiff would ask him to go to places of entertainment with her, and treated her in a cold and sullen manner. Defendant had no property of his own. He lived with his mother on a farm owned by her, and consisting of about 105 acres. This farm, together with other property which she owns, is worth about \$5,000. Defendant leased this farm from his mother, and the income from it, on which they lived, amounted to between \$500 and \$600 a year.

On the other hand, the testimony for the defendant is that he was late at the wedding simply because he had overlooked the time. He was always quiet and non-communicative, and this accounts for his being quiet on the wedding trip. The failure of any one to meet them on the return from their wedding journey was due to a mistake, and while he was looking for the vehicle that he expected to meet them, the public conveyance left the station. That was the reason they had to walk back. Plaintiff had been accustomed to doing a portion of the cooking and household work at her own home before she was married. When she came to the home of defendant she merely assisted his mother in doing that which she had formerly done. Defendant frequently accompanied her to entertainments in the neighborhood. On several occasions he also went with her to the Danville Fair and other places of amusement. He was weak and frail, and frequently too tired and sick to go. When he would refuse to do so, plaintiff would get angry with him, and would sometimes call him a liar. The negro boy testifies that on one occasion she threw a wash tub at him. On several occasions after plaintiff left his home he importuned her to return. On one occasion he sent to her a note in very endearing terms, asking her to come



back to his home. This note was delivered to plaintiff and she read it and threw it down. She did not take it to the house for fear of the members of her family. There is evidence to the effect that Tom Parks, the plaintiff's brother, was very angry at defendant, and made threats against him. On this account defendant refrained from going to the home of plaintiff's mother. On one occasion defendant got his cousin, Mrs. Baughman, to accompany him to plaintiff's mother's house. There there was a discussion of all the matters in dispute, and an explanation made with reference to them. While there plaintiff asked her mother when Fred should return for her, and her mother told her to make no promises. On this occasion defendant assured plaintiff that if she would return to him his mother would give up the entire occupancy of the home and would move to town. Plaintiff was perfectly willing to go, but was prevented from doing so by her brother, Tom Parks, and other members of her family, who were very indignant at defendant, and did not care to have their sister return to him. Defendant also appealed to the sheriff of the county, who was a friend of both parties, to try to induce the plaintiff to return. The defendant says he was never able to get to talk to plaintiff alone, but she seemed to be under the guard of some one every time he saw her. He also testifies that Tom Parks curtly asked him to keep out of the matter. Defendant also got a neighbor to intercede for him, without avail. It is also in evidence that he got the pastor of the Baptist church to attempt to persuade plaintiff's family to let his wife return, but this effort was also unsuccessful. Defendant's testimony further shows that he planned a trip out West, and sent notes to his wife begging her to join him, and assuring her in the most affectionate and sincere terms of his love and good intentions. On one occasion when defendant heard of a visit plaintiff had made to the city of Lexington, he took the next train, hoping to have a talk with her there, but again found her in charge of another brother and uncle, and was prevented from talking to her. It is also in evidence that Mrs. Parks missed her daughter exceedingly, and would frequently call her over the telephone and beg her to come and spend a night with her. Often she would break into tears after talking with her daughter. The brother, Tom Parks, was also devoted to his sister. A number of witnesses also testified to the good qualities of defendant, and to his kind treat-

ment of his wife. Defendant's mother says that the letter of July 12th, above set out, was written as a joke, and was not intended to be taken seriously. She protested against plaintiff showing it to her mother. She further says that when she saw the letter with "h—" in it, it had the word "home." She also says that her son and she thought nothing of the incident with the negro boy, because they were under the impression that plaintiff and the boy, who was a pet of the household, were merely romping.

While we have no power to reverse the judgment of divorce, we can, nevertheless, consider the facts and circumstances of the case for the purpose of passing on the propriety of the chancellor's action in regard to alimony. *Sabastian v. Rose*, 135 Ky., 197; *Patrick v. Patrick*, 30 Ky., L. R., 1364, 101 S. W., 328; Civil Code, Sec. 427.

While there is evidently much in this case that is not revealed by the record, there are several potent and persuasive facts tending to show defendant's aversion to his wife and the cruel treatment which he accorded her. It must be admitted that the letter of July 12th, which contains statements that, according to defendant's mother, are not sustained by the facts, if seriously intended, constitutes an act of unusual cruelty. While there is some testimony to the effect that the letter was intended as a joke, yet we cannot escape the conclusion that such is not the case. There can be found but few cases where a man overlooks the time of his own wedding. The marriage itself began with this show of indifference. This circumstance predisposes us to the conclusion that when defendant wrote the letter in question he intended it to be taken seriously. Indeed, his own mother attempted to persuade him not to write the letter, and to prevent its delivery to Mrs. Parks. Had it been intended as a joke, he would necessarily have protested against its delivery, and made some effort to have his wife tear the letter up or return it to him. True, his own mother did this, but it does not appear that he sympathized with her in the effort. Furthermore, his subsequent letter, written in September, containing the expression "if you wish to come to 'h—,'" is persuasive of the fact that the letter of July 12th was not intended as a joke, and clearly indicates that his attitude toward plaintiff had not then changed. While some effort is made to show that the word "h—" did read, or was intended to read, "home," we fail to find anything in the

letter itself, or in his then attitude toward his wife, to indicate this is true. Indeed, the word "home" is never so abbreviated. Furthermore, if the word "home" had been intended it is by no means probable that he would have used the preposition "to." The ordinary expression in such a case would be "if you wish to come home;" not "if you wish to come to home." While it may be true that had it not been for the interference of others the troubles between plaintiff and defendant might have been adjusted, yet it cannot be doubted that defendant's treatment of his wife was such as to place on his shoulders the blame of the separation, and to justify her in taking up her home with her mother. There are other things in the record which we have not time to enumerate, but considered as a whole, the facts developed in the record make out a case of cruel and inhuman treatment on the part of the defendant. We, therefore, conclude that plaintiff is entitled to alimony. Though it is true that defendant has no estate of his own, yet he is able to work. He is also the only child of his mother, and will inherit from her her estate. Therefore, not only his probable earnings from his own efforts, but his probable inheritance from the estate of his mother may be taken into consideration. *Muir v. Muir*, 28 Ky. L. R., 1359, 92 S. W., 314. Taking these facts into consideration, we conclude that plaintiff is entitled to alimony in the sum of \$500, payable in four installments of \$125 each in one, two, three and four years from the entry of the judgment on the return of this case. We see no reason to change the allowance made to plaintiff's attorneys.

For the reasons indicated, the judgment refusing alimony is reversed and cause remanded, with directions to enter judgment in conformity with this opinion.

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### Caldwell and Drake v. Pierce.

(Decided September 23, 1913).

Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).

Action—Account—Interest.—In an action on an account where a balance is found due to the plaintiff, interest should be allowed on

such balance from the bringing of the action. (For original opinion see 154 Ky., 328).

EUGENE R. ATTKISSON for appellant.

GIFFORD & STEINFELD for appellee.

RESPONSE TO PETITION FOR REHEARING BY CHIEF JUSTICE HOBSON—Reversing.

Upon a reconsideration of this case, we conclude that appellee should be allowed interest on the balance found due her from the filing of her petition. The judgment determines that this amount was then due her, and should have been paid. The general rule is that interest is allowed on the balance due on an account from the bringing of the suit. (Tobin v. South, 18 R., 350; Henderson Cotton Mfg. Co. v. Lowell Machine Shops, 86 Ky., 668.)

The opinion is extended to this extent; the judgment appealed from is reversed on the cross appeal; and the cause remanded for a judgment as above indicated. In other respects the petition for rehearing is overruled.

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### Pugh v. Jackson, Jr.

(Decided September 23, 1913).

#### Appeal from Laurel Circuit Court.

Verdict—Signature of Juror by Mark.—A verdict returned by nine jurors is valid, although one of the jurors made his signature by making his mark, and his signature was not witnessed. (For original opinion see 154 Ky., 649).

SAM C. HARDIN for appellant.

H. J. JOHNSON, C. C. WILLIAMS for appellee.

RESPONSE TO PETITION FOR REHEARING BY CHIEF JUSTICE HOBSON—Overruling Petition.

Section 2268, Ky. Stats., provides:

“That in all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it.”

The verdict in this case was returned by nine jurors, the name of one of the jurors being signed to the verdict by mark. There was no attesting witness to the signature, and it is insisted that for this reason the verdict was invalid. The question was made in the original brief but by inadvertance was not discussed in the opinion. A cross mark for a name or signature is a signature or signing by law unless otherwise provided by statute. (Maupin v. Berkley, 3 R., 617; 2 Blackstone's Commentaries, 305.) In Meazels v. Martin, 93 Ky., 50, it was held that where one signs his name to a mortgage by making his mark, it is a good signature, although not attested by a witness. In Staples v. Bedford Bank, 98 Ky., 451, it was held that one who signs his name to a note as surety by making his mark is bound thereby, even though there be no attesting witness.

Subsection 7 of section 732 of the Civil Code provides:

"The words 'signature,' 'subscription' and words of like import, include a mark by, or for, a person who cannot write, if his name be subscribed to an instrument and witnessed by a person who, near thereto, writes his own name as a witness."

But as was pointed out in the case above cited, this provision only applies to such writings as are required to be executed under the provisions of the Civil Code. The majority verdict of a jury is regulated by the Kentucky Statutes, and the only provision of the Kentucky Statutes as to a signature is section 468, which provides:

"When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing."

The signature of the juror in question was subscribed at the end or close of the writing and was sufficient, although made by mark, and not attested by a witness.

Petition overruled.

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### Alexander v. Alexander.

(Decided September 23, 1913).

#### Appeal from Owen Circuit Court.

**Action—Action for Mistake—Limitation.**—An action for relief for mistake cannot be maintained after ten years from the time the transaction occurred and this rule applies in an action by a

sheriff against his deputy to correct a mistake in a settlement made more than ten years before the action was brought. (For original opinion see 154 Ky., 324).

CLORE, DICKERSON & CLAYTON, H. W. ALEXANDER, H. G. BOTTS and W. A. LEE for appellant.

W. B. MOODY, J. D. VALLANDINGHAM for appellee.

RESPONSE TO PETITION FOR REHEARING BY CHIEF JUSTICE HOBSON—Overruling Petition.

Under section 2519, Kentucky Statutes, an action for relief from fraud or mistake may be brought within five years after the fraud or mistake was discovered, or might have been discovered by ordinary diligence; "but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud." Under this statute it has been repeatedly held that no action for relief for fraud or mistake can be maintained after the lapse of ten years after the transaction occurred. This action was begun on February 9, 1911. The settlements between appellant and his deputy for the years 1898 and 1899 were made more than ten years before the action was brought. The action was, therefore, brought too late to obtain relief against these settlements, although appellant discovered the mistake within five years before the action was brought. (Green Co. v. Howard, 127 Ky., 379.)

Petition overruled.

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### Davis v. Commonwealth.

(Decided September 24, 1913).

#### Appeal from Fayette Circuit Court.

1. Verdict—Verdict in Criminal Case Will Not Be Disturbed Unless Palpably Against Evidence.—The court will not disturb a verdict in a criminal case unless palpably against the evidence, and under this rule, a verdict finding the defendant guilty of stealing money will not be disturbed when based on circumstances on which the conclusion of the jury was not palpably unwarranted.
2. Larceny—Evidence of—Competency.—When the defendant has in his possession soon after the theft, a large sum of money, when

he had none before, this is a competent fact, though the money he so had is not identified with that stolen.

FRED FARRIS for appellant.

JAMES GARNETT, Attorney General D. O. MYATT, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

Joe Davis was indicted in the Fayette Circuit Court for grand larceny, in stealing from Harry Hill \$100; and having been found guilty, he appeals from the judgment entered on the verdict, insisting that the evidence is insufficient to warrant a conviction.

The facts shown by the evidence are about these: Harry Hill was 75 years old. He was a pensioner and was paid on Saturday, June 1, \$117, \$100 of this being in \$10 bills. Hill lived in a house which consisted of three rooms, one behind the other. Hill occupied the center room, Davis the room back of him, and a man named Coleman the front room. The bolt on the door between Hill's room and Coleman's room was on Hill's side of the door; the bolt on the door between Hill's room and Davis' was on Davis' side of the door. On Sunday evening Hill was in his room alone, and placed his money in a pocket of his vest which he hung up on the wall. It began to rain so he could not go out, and he fell asleep. Both doors were closed. When he waked up his money was gone and the door between him and Coleman was still bolted, but the door between his room and Davis, was not fastened. Davis owed Hill \$4.50 for room rent. Hill asked Davis the next morning for his rent. Davis gave him one dollar and said that he had only sixty cents left, and he was going to buy him something to eat with that; that this was all the money he had. On that day, Davis deposited with another to hold for him \$60 in ten dollar bills, saying that he had made the money on a horse race. On that evening he was treating another and had more than \$10 in silver. On that night Hill heard him tell his wife that he had got some money and was going away. The next morning Hill saw him with a new pair of pants on and had him arrested. Davis told the detective who arrested him that he won the \$60 on a horse race, but he did not know the name of the horse; that the race was run at Baltimore. Davis

testified that he had \$35 which he had made and saved; that he put this in the hands of a man named Williams to bet on the Derby at Louisville, and that Williams paid him \$60 as his part of what they had after the betting. Williams was not produced at the trial, and no effort appears to have been made to obtain his testimony. Davis admits that he did not sleep at home Sunday night, and was not there when Hill discovered the loss of his money. His account of how he came by the \$60 and the pair of pants is unsatisfactory, and we cannot say that the conclusion of the jury was unwarranted, although he proved by a number of witnesses that he was of good character. The parties were all negroes, and while there was some conflict in the testimony, the fact that the money was stolen is indubitably established. Davis' conduct on Monday was that of a man who had suddenly come into the possession of money, and if his evidence is true, he had had the \$60 for some days.

While it is true the six ten dollar bills which Davis gave to another to keep for him were not identified in any way with the ten dollar bills which Hill had lost, the fact that Davis had this much money on Monday when he had not the money Monday morning to pay his rent, was a competent circumstance to show that he had gotten Hill's money. The fact being established that Hill's money had been stolen, the question to be determined was, who stole it. And this proof was competent on that question. When money has been stolen, the State may identify the person who stole it by circumstantial evidence, and the fact that a person has soon afterwards an unusual quantity of money, which he did not have before, is, when coupled with other circumstances, convincing evidence, although the identity of the money with that stolen is not shown. The case does not turn on the identity of the six ten dollar bills with the ten ten dollar bills, which were stolen from Hill. The question to be determined being, who stole Hill's ten ten dollar bills, the jury had a right to take into consideration Davis' opportunity to get the money, his leaving his house in the night and spending the night elsewhere, his being without money theretofore, his having money the next day, his unusual spending of money as well as his unsatisfactory explanation of these facts.

Judgment affirmed.



**Caulder, et al. v. Chenault's Executor.**

(Decided September 24, 1913).

**Appeal from Garrard Circuit Court.**

1. **Infants—Sale of Infant's Real Estate.**—It is firmly settled by an unbroken line of decisions of this court that the powers of courts of equity to sell an infant's real estate, or that of persons under disability, are statutory and not inherent; and that the statute providing for such a sale must be followed.
2. **Judicial Sales.**—If a judicial sale as made was authorized under any one section of the Code, it is a valid sale, although the parties may through caution or carelessness, also have attempted to join other or additional unauthorized grounds for the sale.
3. **Judicial Sales—Sale of Land for Re-investment—Jurisdiction.**—Where the mother owned absolutely an undivided interest in a farm, and the remaining interest therein was owned by her children subject to the mother's right of dower and said farm was indivisible, and it was shown to be to the interest of all the parties to sell it and re-invest the proceeds in other land, the circuit court had jurisdiction under section 491 of the Civil Code to order a sale for that purpose.
4. **Infants—Appointment of Guardian Ad Litem.**—Where a guardian ad litem for an infant defendant was prematurely appointed before the infant had been properly summoned, and the court subsequently entered an order approving and ratifying the former appointment of the guardian ad litem who thereafter filed his answer as required by law, the order of approval and ratification was equivalent to a re-appointment of the guardian ad litem, and his subsequent representation of the infant by filing his answer, satisfied the requirements of the Code of Practice.

GREENLEAF & HERRINGTON for appellants.

T. L. EDELEN, R. H. TOMLINSON and LEWIS L. WALKER for appellees.

**OPINION OF THE COURT BY JUDGE MILLER—Affirming.**

In September, 1906, the appellant, Axia Caulder, then Axia Wages, and her husband, John Wages, bought the "Walden Farm" of 216 acres, lying about two miles from Lancaster, for \$15,785.52. Of this sum \$500 was paid in cash; \$12,000 was jointly paid on January 2, 1907, and for the remaining \$3,285.52 John and Axia Wages executed their joint promissory note, bearing interest from January 1, 1907.

John Wages died, and his wife, Axia, subsequently married Dallas Caudler. By his first wife, John Wages

left four children, and by Axia, his second wife, he left five children, Martha, Tilton, Hugh, Cleo and Julia Wages.

On January 22, 1908, Axia Caudler paid the lien note given for the unpaid purchase money on the "Walden Farm," which amounted, at that time, to \$2,487.72. In the meantime she had also bought the interests of John Wages' four children by his first marriage. She thus became the owner of a one-half interest in fee, and the owner in fee of four-ninths of the other half, with a dower interest in the remaining five-ninths of that half.

On January 28, 1908, six days after she paid the lien note, Axia Caulder individually, and as guardian of her four infant children, filed a petition in the Garrard Circuit Court, setting up the combined ownership of the farm; her payment of the lien note out of her individual funds which she alleged she had done for the purpose of protecting the property and to prevent it from being sold for debt; that she was willing to take her dower interest in money under the life tables, she being then thirty years of age; describing the property by metes and bounds, and alleging that it could not be divided without materially impairing its value; that it was in possession; and praying that the land be sold, and after the payment of costs, Axia Caulder be first paid the \$3,487.72; that she next be paid her dower in money, estimated under the life tables, and that the residue be divided between the owners of the land. This action was on petition, and no process was issued or served upon any one, and no proof was taken. The petition was not verified, and it was signed only by the attorneys for the plaintiffs. On March 25, 1908, a judgment was entered, describing the land and directing its sale, but without specifying the purpose thereof. This judgment was never executed.

On February 17, 1909, Axia Caulder, in her own right, and her five children by their mother as their statutory guardian joining as plaintiffs, filed an amended petition making her five children defendants; alleging her guardianship of the children; the ownership of the land in the several parties; that the property was not a good investment for the infants, and that their interests therein would be benefited by a sale of the land and the reinvestment of the proceeds in other property, for these reasons; (1) because the property could not be divided without materially impairing its value, and other property could be purchased which could be divided; (2)

that there was "an indebtedness on the property which must be paid," and that a sale was necessary for that purpose; and, (3) that after the payment of said indebtedness the residue of the purchase money could be invested in a farm which would yield a greater income in proportion to its value than the one sought to be sold. The petition asked that the infants should have the same interest in the reinvestment as they had in the "Walden Farm" which they sought to sell, and that the former judgment of March 25, 1908, which had never been executed, should be set aside because no proof had been taken to support the judgment, and no bond had been given to protect the interests of the infants; and further, because it would be beneficial to the infants to have a sale of said land for a reinvestment of the proceeds. The amended petition further prayed that the land be sold for the purpose therein set out; and, after the payment of debts and costs against the same, that the residue of the proceeds of the sale be reinvested in other land according to the rights of the parties as therein set forth, and that a guardian *ad litem* be appointed to represent the infants. On February 19, 1909, Walker was appointed guardian *ad litem* for the infant defendants, and summons was served the same day upon the infant, Martha Wages, who was over fourteen years of age, by delivering a copy thereof to her, and upon the other infants, who were under fourteen years of age, by delivering a copy of the summons to their guardian *ad litem*. Proof was taken, showing that the land was indivisible, badly run down, with no dwelling upon it, and that it would be to the interest of all concerned to have it sold, and the proceeds reinvested in a farm which would be more suitable for their purpose, and free from debt. Although the petition and the amended petition of February 17, 1909, recited that Axia Caulder was then the statutory guardian of her five children, she was not so appointed until February 25, 1909; but by a second amended petition, filed March 12, 1909, she again set up her appointment as guardian of her children in the Garrard County Court, and her qualification as such guardian. On July 6, 1909, the former appointment of the guardian *ad litem* for the infant defendants was approved and ratified by an order of court, and the guardian *ad litem* filed his answer on that day. On the same day the former judgment was set aside. On July 9, 1909, a judgment was entered, granting the relief sought by

the petition, adjudging that the land could not be divided without materially impairing its value; that it would be beneficial to the infant defendants and the plaintiffs to sell the land for the purpose of investing the proceeds of sale in other lands, and to pay the indebtedness against it; that after the payment of the indebtedness, each party was to have the same interest in the land in which the proceeds should be invested as they respectively had in the "Walden Farm" therein ordered to be sold; and, said farm was ordered to be sold for the purpose aforesaid.

On August 23, 1909, the land was sold to J. W. Elmore and David Chenault for \$15,007, for which they executed their bonds. Elmore subsequently assigned the benefit of his bid to David Chenault, who paid the purchase money into court, with interest, amounting in the aggregate to \$15,457.21. A subsequent judgment of reinvestment was entered on December 1, 1909, which, for the first time, in terms, adjudged that Axia Caulder had a debt against the Walden Farm and the proceeds of sale, for \$3,876.00, which was ordered to be paid, and that the residue of the purchase money, amounting to \$10,592.41, after the payment of the debt, costs, taxes, and expenses of the suit, be invested in other lands, of which last named sum it was adjudged that Axia Caulder owned one-half absolutely, and three-ninths of the other half absolutely; that each of her five children owned one-ninth of one-half of said sum, subject to the dower right of their mother in their interests. The judgment further directed the commissioner to reinvest the net proceeds in the purchase of the "College Hill Farm" of 253 acres in Madison County from David Chenault, for \$13,390.00, and recited that Axia Caulder was willing to pay the difference of \$2,797.59 between the net sum on hand for reinvestment, and the purchase price of said land, and that each vendor should have the same interest in the "College Hill Farm" which she or he had owned in the "Walden Farm," which had theretofore been specifically recited in the judgment. The commissioner was directed to take a deed from Chenault and wife to Axia Caulder and her five children, each "to have an interest therein equal to one-ninth of one-half of said residuary sum of \$10,592.41, in proportion to the purchase price of said farm, subject to the dower right of said Axia Caulder—and the residue of said farm shall belong to said Axia Caulder." The commissioner executed the

deed to Chenault for the "Walden Farm" in exchange for Chenault's deed to the "College Hill Farm," and his acts were approved. Two affidavits were filed, showing that the "College Hill Farm," in which the reinvestment had been made, was worth \$60.00 an acre. It was taken in the reinvestment at about \$53.00 per acre.

David Chenault died in April, 1910. On December 16, 1911, Axia Caulder, and her five children, by their mother as their statutory guardian, jointly entered a motion in this action to vacate and set aside the judgment and sale made thereunder, and all the subsequent proceedings, upon the ground that they were void.

Several grounds are assigned as the basis of the motion, but the two principal grounds, and under which the others may be considered, are (1) that the suit was brought under section 489, subsection 5, of the Civil Code, and the sale was void because no bond was given to the infants as required by section 493 of the Code; and (2) that the action was not brought by the statutory guardian of the infants—she not having been appointed guardian until after the amended petition had been filed. On the other hand, the Chenault heirs contend the suit was brought under subsection 1 of section 489 of the Code, to sell the land for the payment of the ancestor's debt, as well as under section 490, subsection 2, for a sale of the land and a division of the proceeds on account of its indivisibility and section 491 for a sale of the land for reinvestment in other land; and that no bond to the infants is required in a sale under either of those sections. They further claim that in no event was the sale void as to Mrs. Caulder, because it was made upon her application.

The chancellor overruled the motion to set aside the judgment and sale, and from that order Mrs. Caulder and her children prosecute this appeal.

We will consider the questions in the order in which they are above stated.

1. Was the sale void? It is firmly settled by an unbroken line of decisions of this court that the powers of courts of equity to sell an infant's real estate, or that of persons under disability, are statutory and not inherent; and that the statute providing for such a sale must be followed. *Meddis v. Bull*, 13 Ky. L. R., 767; 18 S. W., 6; *Walker v. Smyser*, 80 Ky., 620; *Liter v. Fishback*, 25 Ky. L. R., 260; 75 S. W., 232; *Elliott v. Fowler*, 112 Ky., 376.

Subject to the payment of the \$3,876 due Axia Caulder, the title to the "Walden Farm" was held as follows: One-half by Axia Caulder, absolutely, plus four-ninths of the other half absolutely, giving her a fee in thirteen-eighteenths, and a dower interest in the remaining five-eighteenths, with the fee of the five-eighteenths in the five children.

The several statutory provisions relied upon by the parties, are as follows:

Subsection 1 of section 489, and subsection 2 of section 490 and section 491 of the Civil Code of Practice, under either of which appellees would sustain the sale, read as follows:

"Sec. 489. A vested estate of an infant or of a person of unsound mind, in real property, may be sold by order of a court of equity—

"1. For the payment of any debt or liability of his ancestor or devisor with which he may be legally chargeable, in an action brought against him pursuant to section 428; or in an action brought against him by a creditor of the ancestor or devisor, unless it be enjoined pursuant to section 436.

"Sec. 490. A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant—

"2. If the estate be in possession and the property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein."

Section 489, subsection 5, under which appellants contend the sale was made, reads as follows:

"A vested estate of an infant or of a person of unsound mind, in real property, may be sold by order of a court of equity—

"5. In an action against a person of unsound mind by his committee; or against an infant by his guardian; or, if the infant be a married woman, by her husband, if he be twenty-one years of age, if not, by her next friend, for a sale of the estate and investment in other property."

Section 491 reads as follows:

"In an equitable action by the owner of a particular estate of freehold in possession, or by his guardian or committee if he be an infant or of unsound mind, against the owner of the reversion or remainder, though he be

an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, though he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind—real property may be sold for investment of the proceeds in other real property.”

The statutory provisions requiring a bond to be given to infants in cases wherein their land is sold, are found in sections 493 and 497 of the Civil Code. Section 493 provides that, subject to the provisions of sections 491, 496 and 497, and except the cases mentioned in subsection 2 of section 489, the guardian must execute a bond, with approved surety, to the infant before the sale is ordered, and that if the bond be not given, the sale will be void.

Section 497 further provides, that in the action mentioned in subsection 2 of section 490, the share of the infant shall not be paid by the purchaser, but shall remain a lien on the land until the infant become of age, or until his guardian execute a bond as required by section 493.

In *Elliott v. Fowler*, 112 Ky., 397, we expressly held that where the bond required by section 493 of the Civil Code of Practice had not been executed to the infant, the judgment and sale were void; that the infant lost no rights under them, and the purchaser took none.

If the sale in this case was made either under subsection 1 of section 489, to pay the debt of the ancestor, or under subsection 2 of section 490 because of its indivisibility, as appellees contend, the sale to the extent it was necessary to pay the debt is not void for a failure to give the bond to the infant, since section 493 expressly excepts sales under section 489, while section 497 provides that the infant's share of the purchase money in a sale under section 490, shall remain a lien upon the land in case the bond required by section 493 was not given.

Furthermore, if the sale is made under section 491, which provides for a sale of land in which one person owns a particular estate, with the reversion or remainder in another, for a reinvestment of the proceeds in other real property, no bond is required to be given an infant owner, but the court is expressly required by subsection

5 of section 493 to retain control of the funds until they be reinvested.

But, if this sale was made under subsection 5 of section 489 for a sale of the infant's estate, and an investment of the proceeds in other property, as is claimed by the appellants, the bond was necessary, and the failure to give it rendered the sale void.

It will be noticed that subsection 1 of section 489 provides for the sale of land owned solely by the infant; while subsection 5 of the same section provides for a sale of lands similarly held for reinvestment in other property. On the other hand, subsection 2 of section 490 provides for a sale of land jointly owned by two or more persons when it cannot be divided without materially impairing its value; while section 491 provides for a sale of the entire estate for a reinvestment of the proceeds where there is a particular estate owned by one person, with the reversion or remainder in another.

These several sections of the Code thus provide for the sale of land in a judicial proceeding in cases where the title and possession are held in any of the several ways above pointed out. In some cases a bond to the infant is required, while in others it is not required, and the difficulty in this case arises out of the peculiar facts, which may be considered as bringing the case within the scope and meaning of two sections of the Code, one of which requires the bond to the infants, while the other does not.

In applying the rule to the case at bar, we will disregard the original petition and the first judgment thereunder of March 25, 1908, since it was abandoned and treated as ineffectual by the amended petition of February 17, 1909, which expressly asked that it be set aside; which was done. Treating the case therefore, as having really started with the amended petition, we find it to be a petition by Axia Caulder in her own right, and as guardian, against her five children, and asking a sale of the land because the interest of the infants therein would be benefited by a reinvestment of the proceeds in other property. She owned absolutely an undivided interest in the land; the remaining interest was owned by her children, subject to her right of dower. She was the owner of a particular estate of freehold in possession. Her children owned the remainder. The property was indivisible and it was to the interest of all the parties to sell it and reinvest the proceeds in other property.



Dower had not been assigned her. There had been no partition of the property. Each of the infants owned an interest in the property as a whole, and this interest was subject to the particular estate of their mother in the property as a whole. As it is quaintly expressed in the common law books, each of the tenants in common was seized *per my et per tout*. The property being indivisible and the interest of all the parties requiring a sale for the reinvestment of the proceeds in other property, the court had jurisdiction under section 491 to order the sale for this purpose.

Subsection 5 of section 493 provides:

"In the case mentioned in section 491, the court ordering the sale shall, by its commissioner, retain the custody and control of the fund realized by the sale until the same is reinvested in real estate, or in such other property as the funds of persons under disability may be invested by authority of law, and the court shall order the money to be paid, by its commissioner, directly to the person from whom the purchase for reinvestment is made, and to no other person, and in which case no bond shall be required."

The court followed the statute and retained the custody and control of the fund realized by the sale until it was reinvested in other real estate.

The purpose of section 493 of the Code requiring that the guardian of the infant must execute a bond as therein provided in certain cases is for the protection of the infant, to secure to him the purchase money of the land when it comes into the hands of the guardian. The reason that certain classes of case are excepted out of the operation of the section is that in those cases the money does not come to the hands of the guardian. The law does not contemplate that a vain thing shall be done, and it does not require that the guardian shall give the bond in those cases where no money is to come to his hands; for the bond in this class of cases would be an idle form. In the case at bar, the suit having been brought for the reinvestment of the fund in other lands, no money was to come to the hands of the guardian. In sales made under subsection 2 of section 490, the interest of the infant is required to remain a lien on the land until the infant becomes of age or the guardian executes a bond. This provision applies in those cases where the interest of the infant is separated from the other interest. It has no application where the sale is made under section 491

for the reinvestment of the proceeds in other property. The debt of the ancestor had to be paid, and in so far as a sale was ordered for this purpose, no bond was required. The sale was made solely for the two purposes indicated, and, therefore, under the provisions of the Code, the sale was not invalid because no bond was executed by the guardian.

Subsection 4 of section 492 provides that in the action mentioned in section 491 facts must be stated in the petition, and must be proved showing that the sale will benefit the parties interested in the property. All the facts alleged and all the facts proved were relevant to show the necessity for the sale of the property as a whole, and the reinvestment of the proceeds in other property. The sale being authorized under the sections of the Code we have indicated, it is a valid sale although the parties may have also attempted to sustain it under other sections, or upon other grounds.

2. Was the circuit court without jurisdiction because Mrs. Caulder, the plaintiff, was not the guardian of her children when she filed her amended petition on February 17, 1909?

This objection is based upon the theory that this action was brought under subsection 5 of section 489 for a sale of the infants' estate, and the reinvestment of the proceeds in other property. That statute requires such an action to be brought against an infant by his guardian; and, it is insisted that as Mrs. Caulder was not the guardian at the time the amended petition was filed, the statute was not satisfied and that the judgment is invalid. We have above pointed out, however, that this action was brought under section 491 by Mrs. Caulder in her own right, and that being true the objection is without merit. Furthermore, by her second amended petition of March 12, 1909, Mrs. Caulder truthfully set up her appointment and qualification as guardian of her children; and the action having proceeded regularly from that time, the mistake theretofore made was corrected.

And, although the appointment of Walker as guardian *ad litem* on February 19, 1909, before the infants had been properly summoned, was irregular, the irregularity was fully corrected by the order of July 6, 1909, in which the former appointment of Walker as guardian *ad litem* was formally approved and ratified by an order of court, and Walker thereafter filed his answer as required by law. The most the court was required to do

was to appoint a new guardian *ad litem*, and its order formally approving and ratifying the former invalid appointment of Walker was equivalent to a re-appointment; and his subsequent representation of the infants by filing their answer satisfied the requirements of the Code of Practice.

Judgment affirmed.

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**Commonwealth v. Kentucky Distilleries & Warehouse Company, et al.**

(Decided September 24, 1913).

**Appeal from Bourbon Circuit Court.**

1. **Repeal of Common Law by Statute.**—The common law is impliedly repealed by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject; the common law is not repealed, however, if there is no repugnancy between it and the statute, and it does not appear that the legislature intended to cover the whole subject.
2. **Criminal Law—Indictment.**—It not infrequently occurs that the same act may constitute, in whole or in part, two or more offenses; and in that event it is the accusative part of the indictment that determines the offense charged.
3. **Nuisance—May Be Prosecuted Under Common Law or Under Statute.**—Any use of property which was at common law a nuisance, does not cease to be so because the same act is made an offense by statute and a different punishment provided, and the party creating the nuisance may be prosecuted under either the common law or the statutory remedy.
4. **Common Law—Indictment—Multifariousness.**—An indictment accusing the defendant of making and maintaining a common public nuisance by permitting refuse from a distillery to flow into a stream thereby polluting it, is not multifarious, and is valid under the common law, notwithstanding section 1253 of the Kentucky Statutes prescribes a statutory penalty for a similar offense.

JAMES GARNETT, Attorney General, and D. O. MYATT, Assistant Attorney General, for appellant.

KEITH L. BULLITT, WILLIAM MARSHALL BULLITT and JAMES M. O'BRIEN for appellees.

**OPINION OF THE COURT BY JUDGE MILLER—Reversing.**

This appeal by the Commonwealth presents for review the ruling of the circuit judge in sustaining a general demurrer to the following indictment:

“The grand jury of the county of Bourbon, in the name and by the authority of the Commonwealth of Kentucky, accuse the Kentucky Distilleries & Warehouse Co. and Julius Kessler & Co. of the offense of unlawfully making and maintaining a common public nuisance, committed as follows:

“The said Kentucky Distilleries & Warehouse Company, which was then and there a corporation organized and incorporated under the laws of the State of New Jersey, and Julius Kessler & Co., which was then and there a corporation incorporated and organized under the laws of the State of West Virginia, in the said county of Bourbon, on the 10th day of December, A. D., 1910, and on divers days thereafter, habitually and continuously during the period from and after said date, within twelve months before the finding of this indictment, at and on that certain distillery and distillery premises, formerly and commonly known as the Walsh Distillery, then and there owned by and in their occupation and under their control, and then and there being operated by said defendant corporations, situated near to that public highway of the county of Bourbon known as the Paris and North Middletown Turnpike, and near the city of Paris and Stoner avenue, one of the public streets of said city, and near to Stoner Creek, one of the running waters of the State of Kentucky and from which the water supply for domestic uses and purposes of the citizens of Paris was then and there drawn, did unlawfully make, cause, suffer and permit still slops, filth and refuse from said distillery and waste slops, manure, offal and filth from several hundred cattle then and there on said distillery premises and on premises adjacent thereto being fed on slop from said distillery, to accumulate at and near said distillery, did pump and permit to be pumped and cause and suffer to flow into sinks on a piece of the woodland formerly owned by G. G. White and John White and known as the ‘Gilt Edge Stock Farm,’ now owned by John T. Hinton, and which sinks were then and there by said Julius Kessler & Co. leased of and from said John T. Hinton and used by said defendant companies as receptacles for same, and in said sinks to be and remain, rotting, festering, running over, drained out of, escaping, finding its way and sent into a small branch or creek tributary to the hereinbefore mentioned Stoner Creek, through which it flowed into said Stoner Creek, giving forth and emitting foul, of-

fensive and disagreeable odors, impregnating the atmosphere and rendering same foul, offensive, noisome and disagreeable, and so charging and polluting the waters of said Stoner Creek with said refuse from said distillery, waste slops, manure, offal and filth from the cattle hereinbefore mentioned that the waters of said Stoner Creek were so corrupted and charged with filth, stench and smells as to be unfit for domestic uses and purposes and producing such discomfort and annoyance to persons of ordinary sensibilities, and especially to those residing in that particular neighborhood, as to impair their comfortable enjoyment of life, to the common nuisance and annoyance of persons living on Stoner avenue in the city of Paris, and traveling and having the right to travel said Stoner avenue, and to all persons traveling and having the right to travel along, over and across the Paris and North Middletown pike, and jeopardizing and endangering the health of all persons using and having the right to use for domestic purposes the waters of Stoner Creek, to the common nuisance, annoyance and jeopardy of all good citizens of this Commonwealth and against the peace and dignity of the Commonwealth of Kentucky."

The record fails to disclose the ground upon which the circuit judge sustained the demurrer, and opposing counsel, in their briefs, assign different reasons for the court's action. Counsel for appellant say the demurrer was sustained because the court was of the opinion that the indictment charged two offenses: (1) the common law offense of maintaining a common public nuisance; and (2) the statutory offense of polluting a stream; thus violating section 126 of the Criminal Code of Practice, which provides that an indictment, except in the cases mentioned in section 127, which does not embrace cases of this character, must charge but one offense.

Counsel for appellee contend, however, that the indictment is defective because it charges the offense of maintaining a common public nuisance under the common law, which, it is claimed, has been abrogated and superseded by the statute, which reads as follows:

"1253. If any person put, or cause to be put, in any stream, dam, pool or pond any liquid, berries, powders, medicine or other thing, or explode, or cause to be exploded, dynamite or any other substance, whereby fish, great or small, are or may be sickened, intoxicated or killed, or the water rendered unfit for use, or stench be

produced, he shall be fined not less than ten nor more than one hundred dollars, and imprisoned in the county jail not less than thirty days nor more than six months, in the discretion of the jury, for each offense."

Appellant relies upon Peacock Distilling Company v. Commonwealth, 25 Ky. L. R., 1778, 78 S. W., 893, as conclusively requiring a reversal, while appellee insists that the Peacock case is not authoritative because it only decided that the indictment then before the court was not multifarious and charged but one offense; and that the question whether the common law offense had been superseded by the statutory offense was neither raised nor decided. In support of its position appellee relies solely upon the following language from 8 Cyc., 376:

"The common law is impliedly repealed by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject matter."

The clause quoted from further says:

"The common law is not repealed, however, if there is no repugnancy between it and the statute, and it does not appear that the Legislature intended to cover the whole subject. Statutes in derogation of the common law are to be strictly construed, unless as in some States, there is a provision to the contrary."

And although we have a statute, in section 460 of the Kentucky Statutes, requiring a liberal construction of statutes, the questions of repugnancy and legislative intention still remain the controlling elements in determining whether there has been an abrogation of the common law as to any particular offense. Section 1253 of the Kentucky Statutes, above quoted, is a part of the Act of 1893, and has been repeatedly before the courts in cases of this character.

In Peacock Distilling Company v. Commonwealth, *supra*, decided in 1904, the court said:

"Appellant was indicted, convicted and fined \$1,500 for suffering and committing a common nuisance. The indictment describing the offense charges that the defendant corporation, being in the possession and control of a certain distillery in Bourbon County, which was located on Stoner Creek, and near a public highway, 'did unlawfully suffer and permit the still slops and refuse from said distillery to accumulate at and around said distillery, and did suffer and permit same to flow into the waters of said Stoner Creek, whereby the said stream

of water was rendered foul, noisome and unfit for use for man or beast, and caused the fish in said stream to die, whereby there did arise from a distillery, still slops and refuse, stream of water and dead fish, foul, unhealthy and disagreeable odors, and render the atmosphere foul, noisome, disagreeable and dangerous to the health, comfort and happiness, and to the common nuisance and annoyance, of all citizens of the Commonwealth of Kentucky, and especially to those living in the neighborhood of said stream and distillery, and passing along said highway,' etc.

"Appellant complains that the indictment charges two offenses: One the common law offense of maintaining a nuisance, and the other the statutory offense of poisoning or polluting a stream of water, whereby fish are sickened and killed, and that, therefore, it was demurrable for multifariousness. It not infrequently occurs that the same act may constitute, in whole or in part, two or more offenses. In that event it is the accusative part of the indictment that determines the offense charged by the Commonwealth. This indictment does not go upon the idea that the statute has been violated. It is not a prosecution for a violation of that or any statute, but it is drawn to charge the common law offense of maintaining and suffering a nuisance. The description of the acts constituting the offense states not only the suffering of the filth and slop to accumulate so as to create unhealthful and offensive odors, but that by letting the slops and filth escape into the stream it killed the fish, which, decomposing, added to the offensiveness of the other odors. The gravamen is the creation of unhealthful, noisome odors; that fish were killed and waters polluted by the slop were only incidents and parts of the main offense. The indictment was not duplex, and the demurrer was properly overruled. (*Commonwealth v. Megibben*, 19 Ky. Law Rep., 292; *Greenbaum v. Commonwealth*, 10 Ky. Law Rep., 723.)"

The Peacock Distilling Company case was cited with approval in *India Refining Company v. Commonwealth*, 117 S. W., 274, decided in 1909, in which this court sustained a judgment convicting the appellant of the common law offense of polluting the waters of Elkhorn Creek in Franklin County, by emptying into it refuse from an oil refinery.

Likewise in the *Megibben* case, 101 Ky., 197, decided in 1897, the court said:

“The objections to this indictment urged by appellee in support of the judgment of the trial court are as follows: First, that the indictment attempts to charge two offenses, the killing of the fish, which is a statutory offense, and the corruption of the air. We do not think that the averment as to killing the fish necessarily makes the indictment duplex, as it is averred merely as one of the constituent elements going to make up the nuisance. As in the case of an indictment for the nuisance of keeping a disorderly house there are frequently alleged various statutory or common law offenses, such as gaming.”

These authorities are in line with the general rule announced in 29 Cyc., 1279, as follows:

“In the various States there are found numerous statutes providing for the punishment of, or the imposition of penalties on persons creating or maintaining nuisances, which do not, however, supersede the common law, where they do not attempt to cover all cases of public nuisance. Such statutes are construed according to the general rules for the construction of penal statutes.”

And, in 2 Roberson's Kentucky Criminal Law & Procedure, section 632, it is said:

“Any use of property which was at common law a nuisance does not cease to be so because the same act is made an offense by statute and a different punishment provided. The party creating the nuisance may be pursued under either the common law or statutory remedy. And where the act charged as a common nuisance is an act prohibited by statute, upon failure to show that it was such as to annoy the public, so as there can be no conviction for the alleged nuisance, there may nevertheless be a conviction under the statute. A public nuisance is a misdemeanor at common law, and the common law punishment is by fine or imprisonment, or both, which has not been changed in this State.”

In support of the foregoing text Roberson cites *L. & N. R. R. Co. v. Commonwealth*, 16 Ky. Law Rep., 347; *Greenbaum v. Commonwealth*, 10 Ky. L. R., 723; and *Sullivan v. Commonwealth*, 13 Ky. L. R., 397.

From these authorities it is clear the indictment is not demurrable upon either the ground that it is multifarious, or that the prosecution should have been under the statute and not under the common law. Where, as was said in the *Peacock Distilling Company* case, the same act constitutes, in whole or in part, two or more



offenses, the accusative part of the indictment determines the offense charged; and since in the case in hand the indictment accuses the defendants of making and maintaining a common public nuisance, which is a common law offense, it is squarely within the rule of criminal procedure there laid down. The decision in that case is conclusive of this case.

Judgment reversed with instructions to overrule the demurrer to the indictment, and for further proceedings.

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### **Coulter v. Commonwealth.**

(Decided September 24, 1913).

#### **Appeal from Monroe Circuit Court.**

1. **Indictment—Pleading—Alternative Pleading Not Authorized by Criminal Code.**—Alternative pleading is not authorized by the Criminal Code, therefore an indictment charging defendant with having sworn falsely upon one of two occasions when he made conflicting statements under oath, but stating that the grand jury did not know which statement was true is insufficient.
2. **Indictment—False Swearing.**—In an indictment for false swearing the alleged false statement must be negatived by special averment.

W. S. SMITH, JACKSON, DENHAM & COPAS, SPEAR & DENTON and MAX B. HARLIN for appellant.

JAMES GARNETT, Attorney General; D. O. MYATT, Assistant Attorney General, for appellee.

#### **OPINION OF THE COURT BY JUDGE TURNER—Reversing.**

An indictment was returned against appellant wherein it was attempted to charge him with false swearing; his demurrer to the indictment was overruled, and being placed upon trial he was found guilty, and from that judgment he appeals.

Several reasons are given for reversal, but in view of our conclusion as to the sufficiency of the indictment we will consider only one.

The indictment is as follows: "The grand jury of Monroe County, in the name and by the authority of the Commonwealth of Kentucky, accuse James Coulter of the crime of false swearing, committed as follows, viz.: The said James Coulter on the — day of —, 1910, and before the finding of this indictment, in the county

and Commonwealth aforesaid, did unlawfully, after having been duly sworn to testify to the truth in an inquest court held by and in the office of M. D. Kidwell, then judge of the Monroe County Court, said Judge having authority to administer an oath, touching the whereabouts of a deed made by one Milton Brown to his said Brown's sons, Roland, Bether and Wesley Brown, did then and there knowingly and falsely state and swear that he did not hear Milton Brown tell R. G. Railey at Railey's office or any where else on the face of the earth to burn or destroy said deed;" that on the 1st day of April, 1911, and before finding of this indictment, said Coulter, after first being duly sworn as the judge of the Monroe Circuit Court, said judge having authority to administer said oath, to testify to the truth in a trial of a prosecution then pending in said court, wherein the Commonwealth of Kentucky was plaintiff and R. G. Railey was defendant, charged with burning or destroying said aforesaid deed, did willfully knowingly and falsely state and swear that he did not hear Milton Brown tell R. G. Railey at Railey's office to burn or to destroy said deed—one of the other of said statements so made by said Coulter is and was false and untrue and were known to be false and untrue by said Coulter at the time he made same, but which one of said statements was false and untrue is to this grand jury unknown, but was known by said Coulter to be false and untrue when he made same, when in fact and truth said Coulter did or did not hear Milton Brown tell said Railey to burn or destroy said deed, whether he did or not hear said Brown so state is to this grand jury unknown, but is and was known to said Coulter when he made same, contrary to the form and the statutes in such cases made and provided against the peace and dignity of the Commonwealth of Kentucky."

By the provisions of section 124 of the Criminal Code an indictment is required to be direct and certain as regards the offense charged, and the particular circumstances of the offense charged must be set out if they are necessary to constitute a complete offense.

From the very nature of the offense of false swearing it is essential to set out the particular circumstances constituting it; that is that the defendant at a certain time and upon a certain occasion made certain fa

statements while under oath, and setting out in substance the false statement charged.

The statement so given by him must be charged in the indictment to be false, that he knew it was false at the time, and must be distinctly negatived in the indictment.

The indictment in question does not charge that the defendant upon any certain occasion made any specified false statement; but charges in the alternative that upon one of two occasions he made false statements, having made conflicting statements upon the two occasions named, and that upon which one of them the false statement was made, or which statement was false, was unknown to the grand jury. There is no provision in our Criminal Code authorizing alternative pleading, and it is perfectly apparent that such an indictment does not conform to the requirements of the Code, and is not sufficiently certain and direct in its charge of the offense, or particular circumstances under which it was committed.

It is a well settled rule in this State that an indictment for false swearing must negative by special averment the matter alleged to have been falsely stated. *Commonwealth v. Still*, 83 Ky., 275; *Commonwealth v. Kane*, 92 Ky., 457; *Commonwealth v. Porter*, 17 R., 554.

In this indictment, not only is the statement alleged to have been made not negatived, but on the contrary it was expressly stated that the grand jury did not know which of the statements was true. Clearly such an indictment was insufficient.

Judgment reversed, with directions to sustain the demurrer.

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### Josselson v. Commonwealth.

(Decided September 24, 1913).

#### Appeal from Pike Circuit Court.

1. **Intoxicating Liquors—Local Option Law—Place of Sale—Evidence—Peremptory Instruction.**—Where the purchaser of whiskey gives, in local option territory, to the member of a firm engaged in business where the local option law is not in force, an order to send him a gallon of whiskey, the sale takes place at the point where the whiskey is delivered to the express company, and not at the place where it is delivered by the express company to the pur-

- chaser, in the absence of any understanding or agreement between the seller and the purchaser that the whiskey is not to be paid for until actually delivered to the purchaser, in which event the sale takes place at the point where delivery is made by the express company, and if such delivery be made in local option territory, the seller is liable under the local option act.
2. Intoxicating Liquors—Act of 1912—Instructions.—The Act of 1912, making it unlawful to purchase or procure intoxicating liquors as the agent of the seller or buyer, refers to the purchase or procurement of it in prohibited territory.

J. J. MOORE and PINSON & STATEN for appellant.

R. MONROE FIELDS, Commonwealth Attorney; JAMES GARNETT, Attorney General, and OVERTON S. HOGAN, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Reversing.

Appellant, Frank Josselson, was indicted for the offense of selling, loaning, procuring for and furnishing intoxicating liquors to another in Pike County, Kentucky, where the local option law was in force. He was tried and convicted, and his punishment fixed at a fine of \$60. From the judgment of conviction he prosecutes this appeal.

The evidence heard on the trial is, in substance, as follows:

H. M. Hoskins, the purchaser of the liquor, states that while in a pool room in Pikeville, appellant inquired of him if he "wanted anything." Witness said yes, he might send him a gallon. In a few days the liquor came to the express office, and witness got it and used it. A short time thereafter appellant came into the office of witness and witness asked him how much he owed him. Appellant either handed him a bill or told him the amount and witness paid him \$4 for the liquor. This occurred after September, 1912. On cross-examination witness stated that Mr. Josselson was engaged in business at Catlettsburg, Kentucky, and the local option law was not in effect there.

At this point the Commonwealth closed, and the defendant moved for a peremptory instruction, which motion was overruled.

Thereupon appellant himself testified as follows:

Was in the liquor business in Catlettsburg, Kentucky, and Ironton, Ohio. Catlettsburg was not local

option territory. One evening he was in a pool room in Pike County, watching some men play pool. Mr. Hoskins came in and asked him when he was going home. He told Hoskins he would leave the next morning. Hoskins said to send him a gallon of whiskey. Witness went home the next morning and told his brother, who managed his business, and presumes that the whiskey was sent. Witness did not attend to the shipping part of it. Witness was in partnership with his brother at Catlettsburg. His brother managed the affairs and the shipping. Sometimes they shipped whiskey from Ironton, Ohio, and sometimes from Ceredo, West Virginia. Could not say how the whiskey in question was shipped. On cross-examination witness stated that he told his house what Mr. Hoskins told him. Thinks it was in January when he collected for the whiskey. He had a statement in his pocket and handed it to Hoskins. Thinks the amount of the bill was \$4.25. Hoskins handed him the money. In shipping whiskey into Pike County they sometimes shipped it from their Ironton place. Could not say whether or not it was shipped from Kentucky. Their rule was in shipping to Kentucky to ship from Ceredo, West Virginia, or from Ironton, Ohio. Ceredo is about three miles from Catlettsburg and Ironton is about eleven miles. The reason that they did not ship from Catlettsburg was that the express office would not accept orders for Kentucky points.

H. M. Hoskins being recalled by the court testified that he got the whiskey by express out of the express office. Thinks the express charges were paid. The express office was in Pikeville. On cross-examination witness stated that he was not sure about the express charges being paid. Thinks that he got this particular liquor for his own use. Could not say from what house it came. Along about that time he frequently got whiskey for election purposes.

So far as the evidence now before us is concerned, it is manifest that the case amounts to this: The purchaser, Hoskins, knowing that appellant was engaged in the liquor business in the city of Catlettsburg, requested him to send him a gallon. In the absence of any understanding or agreement to the contrary, the presumption is that the purchaser intended the goods to be shipped in the usual manner, that is, by common carrier, and that the common carrier is the agent of the

purchaser. Therefore, when the whiskey was delivered to the carrier at Catlettsburg, the agent of the purchaser, the title thereto vested in the purchaser, and the sale took place in Catlettsburg and not in Pike County. *Commonwealth v. Gast, &c.*, 143 Ky., 674; *Parker v. Commonwealth*, 147 Ky., 715; *Doores v. Commonwealth*, 28 Ky. L. R., 192. Since under the evidence before us the sale took place in Catlettsburg and not in Pike County, appellant was entitled to a peremptory instruction. However, if it was understood or agreed between appellant and the purchaser, Hoskins, that the whiskey was not to be paid for by Hoskins unless or until it was delivered to him in Pike County, then the sale took place in Pike County, and appellant was liable.

Among the instructions given by the trial court was one authorizing a conviction under the Act of 1912, which makes it unlawful for any person, firm or corporation to purchase or procure from another spirituous, vinous, malt or other intoxicating liquors, mixtures or decoctions, either as agent of the buyer or agent of the seller, in any county, district, precinct, town or city, where the sale of intoxicating liquors has been prohibited or may be prohibited, whether by special act of the General Assembly or by vote of the people under the local option law of the State. Manifestly this instruction was erroneous, for it has been held that the Act of 1912 refers only to the purchase or procurement of intoxicating liquors in prohibited territory. *Calhoun v. Commonwealth*, 154 Ky., 70. In the present case the whiskey was neither purchased nor procured in local option territory.

If on the return of the case the evidence be substantially the same as that before us, the court will direct a verdict in favor of appellant. If, however, there be evidence tending to show that it was understood or agreed between appellant and the purchaser, Hoskins, that the whiskey was not to be paid for unless or until it was delivered to Hoskins in Pike County, the court will instruct the jury as follows:

The jury should find the defendant not guilty unless they believe from the evidence beyond a reasonable doubt that it was understood or agreed between Hoskins and the defendant that the whiskey was not to be paid for by Hoskins unless or until it was delivered to him in Pike County, in which event they will find him guilty and fix his punishment at a fine of not less than sixty

nor more than one hundred dollars, or confinement in the county jail for not less than ten nor more than forty days, or both such fine and imprisonment in their discretion.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

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### Sutton v. Commonwealth.

(Decided September 25, 1913).

#### Appeal from Daviess Circuit Court.

1. **Indictment—Sufficiency of Allegation—Larceny.**—An allegation in an indictment that the defendant took a pocketbook and \$110 in money from the person of A, is a sufficient allegation that the defendant took and carried away the property.
2. **Judgment—When Should Not Be Reversed—Instructions—Variance.**—The defendant was charged with stealing the property of Stuart Robbins. The proof showed that the property belonged to Stewart Roberts. The court in his instructions used the two names interchangeably, the defendant not having been misled in any way, or prejudiced held, that the judgment should not be reversed.
3. **Judgment—When Will Not Be Reversed—Evidence.**—The circuit court having ruled out certain improper questions asked a witness, a reversal will not be had where the witness simply failed to prove the facts, which the Commonwealth Attorney sought to show.

LOUIS I. IGLEHEART for appellant.

JAMES GARNETT, Attorney General; D. O. MYATT, Assistant Attorney General, for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—  
Affirming.

Jennie Sutton was indicted in the Daviess Circuit Court, charged with grand larceny. On a trial of the case she was found guilty and the court having entered judgment upon the verdict, she appeals.

The first point made on the appeal is that the indictment is insufficient. It is charged in the indictment that the accused "feloniously took from the person of Stuart Robbins his pocket book containing more than \$20 in lawful money of the United States; the ex-

act character and description of same being unknown to the grand jury; which pocket book and money was then and there the property of said Stuart Robbins and was then and there of greater value than \$20; and this the defendant did without the consent of said Robbins, and intending to convert same to her own use and to permanently deprive said Robbins of his ownership and possession thereof." It is insisted that the indictment does not charge an asportation of the property. It is true it does not use the words "took and carried away," but it does use the words "took from the person of Stuart Robbins." If the defendant took the pocket book and money from the person of Stuart Robbins, she took and carried it away; for a removal of the pocket book from his person is a sufficient asportation to make out the offense. In *Adams v. Commonwealth*, 153 Ky., 88, a conviction was sustained where the defendant ran his hand in the pocket of another, although his hand was seized before the money was entirely removed from the pocket. A number of authorities on the subject are collected in that opinion.

It appeared on the trial that the person referred to was Stewart Roberts, and it is insisted that the variance was fatal. In *Hensley v. Commonwealth*, 1 Bush, 11, the defendant was indicted for stealing Stephen Daniels' hog. The proof showed that the hog was the property of Phillip Daniels. It was held that the prosecution could not be sustained. In *McBride v. Commonwealth*, 13 Bush, the defendant was charged with stealing the horse of W. F. Watson. The proof showed the horse belonged to Cassam Watson. It was held that the variance was fatal. On the other hand, in *Bronaugh v. Commonwealth*, 2 Ky. L. R., 286, it was held that where the name alleged in the indictment is *idem sonans*, the variance is not fatal; and this is a well settled rule. There is no doubt that Stuart and Stewart are *idem sonans*. Robin is only a diminutive of Robert, like Rob, Bob, Bobby, etc. (See Webster's Dictionary.) The tendency of modern decisions is to relax the rule and to hold the variance not fatal, where the names are similar in sound and the party was not in fact misled and could not reasonably have been misled. In this case the parties were all negroes; the spelling of negro names is very uncertain, especially where they cannot read or write. The court treated the two names as the same, using them as synonymous in his instructions. The



judgment will, therefore, bar another prosecution for stealing the property of Stewart Robbins. There had been an examining trial, and the defendant understood exactly what she was charged with. So there was no substantial error. The jurisdiction of this court in criminal cases is entirely statutory. Section 340 of the Code, provides:

"A judgment of conviction shall be reversed for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby."

Upon consideration of the whole record, we are satisfied that the substantial rights of the defendant, were in no manner prejudiced by the spelling of the name as Robbins, instead of Roberts, and that under the statute the judgment should not be reversed for this reason.

After the State had introduced its evidence, and the defendant had introduced her evidence, the State introduced in rebuttal Bertha Williams, and the Commonwealth attorney, over the objection of the accused, was allowed to ask her a number of questions which were incompetent; but at the conclusion of her testimony, the court ruled it all out. It is insisted that for this reason, a new trial should now be granted. There would be more force in this if the witness had testified to any facts affecting the defendant, but she answered in the negative the questions that were asked her, and when the court ruled out her entire testimony, we do not see that the defendant was in any worse position than she would have been if the court had refused to allow the witness to answer the questions when asked. We cannot presume that the jury were influenced by the unsuccessful effort of the Commonwealth attorney to prove certain facts by the witnesses, when the court at the conclusion of her evidence ruled out all the testimony.

Judgment affirmed.

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## **East Tennessee Telephone Company v. Parsons.**

### **Same v. Same.**

(Decided September 25, 1913).

### **Appeals from Mercer Circuit Court.**

1. **Highways—Obstruction of—Objects that will Frighten Horses—Rights of Telephone Company.—A telephone company that had**

the right to erect poles and string its wires along the right of way of a public road may put coils of wire to be used in stringing its line on the right of way of the road without subjecting itself to liability on account of horses being frightened thereby.

2. Highways—All Parts of Set Aside for Public Use.—All parts of a public road are set apart for public use, and it is actionable negligence to unlawfully or without right place any nuisance or obstruction therein.
3. Highways—Nuisance in Right of Way Outside of Traveled Part.—An unlawful or unauthorized obstruction or nuisance on the right of way of a public road, although it may be outside the traveled part, may be the basis of an action, if it is calculated to frighten a reasonably gentle horse.
4. Highways—Difference between Liability for Placing Obstruction in the Traveled Part and Outside of It.—It is not permissible, for persons not authorized so to do, to place any sort of obstacle in the traveled part of the road that will obstruct or interfere with its use, while in many instances it is legitimate to place and permit to remain on the side of the road, outside of the traveled part, objects which, if placed in the traveled part, would constitute an obstruction.
5. Highways—Difference Between the Rights and Liabilities of Those Who Have the Right to Use the Right of Way and Those Who Have Not.—Whether liability attaches to a person who places objects and things on the side of a road depends largely on whether or not he had the right to do so rather than on the character or shape or kind of object that was placed, as a person having the right to do so may with freedom from liability place many things on the right of way that a person not having such right could not safely do.
6. Highways—Objects Calculated to Frighten Horses—Rule.—The mere fact that an object on the side of a road is calculated to frighten a reasonably gentle horse is not the sole standard by which the liability of the party placing it there is to be measured in an action by a person injured by the fright of his horse; nor does the fact that the objects placed on the side of the road are new and unusual things in the conduct of the business of the persons having the right to place them, increase their liability.
7. Highways—Objects That Will Frighten Horses—Question for Jury.—The general rule is that it is for the jury to say whether the thing complained of was calculated to frighten a reasonably gentle horse, but this does not mean that every time a horse becomes frightened at an object rightfully placed on the side of the road that the question must be left to the jury. It is only the right of the jury to pass on questions like this when there may be reasonable grounds for difference of opinion as to whether the object was rightfully placed on the road and from its size and appearance calculated to frighten horses.
8. Highways—Reasonable Time in Which Telephone Company May Use Wire Placed on Side of Road.—Where a telephone company, in the erection of a new line, placed coils of wire on the side

of the road, to be used in erecting a line, it might leave them there for several days without subjecting itself to liability on the ground that they were there an unreasonable length of time.

E. H. GAITHER for appellant.

C. E. RANKIN for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing one and affirming the other.

The horse drawing the vehicle in which the appellee, Mrs. Sarah Parsons, was riding on one of the public roads of Mercer County, became suddenly frightened at coils of telephone wire lying on the ground in the right of way but outside of the traveled part of the road, and turning sharply around, upset the vehicle. When the vehicle was overturned, Mrs. Parsons, who was thrown out, received severe injuries, and to recover damages therefor brought suit against the telephone company, which resulted in a verdict in her favor for a substantial sum.

One of these appeals is prosecuted by the company to obtain a reversal of the judgment against it, and the other appeal is prosecuted from a judgment of the Mercer Circuit Court dismissing a petition of the telephone company in which it sought a new trial in the negligence case upon the ground of newly discovered evidence. As we have reached the conclusion that the judgment in the negligence case must be reversed, it will not be necessary to again refer to the suit seeking a new trial, except to say that the petition did not state sufficient reasons to authorize the granting of a new trial, and, therefore, the judgment of the lower court dismissing it was correct.

There is no substantial issue made by the evidence in the negligence case, and the facts may be briefly stated as follows: The horse drawing the vehicle was an ordinarily gentle horse, and at least two or three times shortly before the day on which the accident occurred, had been driven by the telephone wire at which it scared without being frightened by it. The telephone company owned and operated a telephone line along the road on which Mrs. Parsons was traveling, the poles being in the right of way but outside of the traveled part of the road. Desiring to put in a new line, it dis-

tributed along the road coils of wire to be used in erecting this line. The wire at which the horse frightened consisted of two coils placed one on top of the other, each of the coils being about three inches high, both of them together being about six inches in height, the diameter of the coils being probably 24 inches. The wire was new and bright colored, such as is usually used by telephone companies, and the coils were located some two or three feet outside of the traveled way of the road but on the right of way of the road and between the traveled part and the fence on the line between the road and the adjoining land owner, and had been there several days before the accident. When the wire was distributed along the line, the company commenced to put up the string in which it was to be used, and the work, although in progress, had not reached the point where the accident occurred, and hence this wire had not been moved from the place it was first put.

We may assume, as there is no issue to the contrary, that the telephone company had the legal right to erect its poles and wires on the right of way of this road, and this right of course included the right to maintain the telephone lines in repair and to string new lines of wire on its poles and to distribute wire along the road for this purpose. We may further assume that the horse being driven to the vehicle was a reasonably gentle horse and that Mrs. Parsons was not guilty of any negligence that contributed to her injury.

With these facts assumed, as they may well be from the evidence, it is the contention of counsel for Mrs. Parsons that it was a question for the jury to say whether the wire, located as it was, was such an obstruction in the highway as was ordinarily calculated to frighten a reasonably gentle horse, and that when the jury was properly instructed, as it was, that if "they believed from the evidence that the coils of telephone wire described in the evidence were placed or left on the right of way of the turnpike at the time and place mentioned in the evidence, and allowed to remain an unreasonable length of time, and that said coils of wire so placed and left were ordinarily calculated to frighten and make unmanageable a reasonably gentle horse when driven along said pike by one exercising ordinary care, and that while plaintiff was being driven along said pike in a surrey drawn by a reasonably gentle horse, said horse became frightened at said coils of wire so

placed and left, and thus became unmanageable, causing said horse to turn suddenly around and overturn said surrey, thereby throwing plaintiff out upon the ground and stones so as to injure her, the law is for the plaintiff, and you will so find," the court should not interfere with the finding upon the question of fact submitted in the instructions.

On the other hand, the argument in behalf of the telephone company is, that in placing and leaving these coils of telephone wire in the manner and under the circumstances stated, the company was not guilty of actionable negligence, although they may have frightened a reasonably gentle horse, and, therefore, the jury should have been directed to return a verdict in its favor.

Upon the facts shown by the record there are two questions presented for our consideration. First, did the placing of the wire in the manner and for the purpose stated constitute a nuisance or an obstruction of the highway within the meaning of the rule of law that holds persons liable for placing or maintaining a nuisance or obstruction in a highway? Second, if the placing of the wire as indicated was not a nuisance or obstruction, did the fact that it was permitted to remain there for several days have the effect of converting what was originally a lawful act into an unlawful one?

There is no disagreement in the authorities that all parts of a public road are set apart for public use, and that it is actionable negligence to unlawfully or without right place any nuisance or obstruction in a highway that interferes with its use by the public, or that results in injury to any traveler rightfully using the road. It is also well settled that an unlawful or unauthorized obstruction or nuisance on the right of way of a public road, although it may be outside the traveled part of the road and so located as not to interfere with ordinary travel, may be the basis of an action if it is calculated to frighten a reasonably gentle horse. There is, however, quite a difference between the liability for placing or maintaining a nuisance or obstruction in the traveled part of the road and placing or maintaining it outside of the traveled part but on the right of way, as it is not permissible for persons not authorized so to do to place any sort of obstacle in the traveled part of a road that will obstruct or interfere with its use; while in many instances it is entirely legitimate to place

and permit to remain on the side of the road outside of the traveled part objects which if placed in the traveled part would constitute an obstruction. For example, abutting property owners and others who have acquired the right to do so may place and maintain for temporary and even permanent purposes many objects and things on the right of way outside of the traveled part of the road, free from liability for obstructing the highway.

It is further manifest that there should be a marked distinction between the rights and liabilities of those who have the right to use the right of way outside of the traveled part for the purpose of placing temporary or permanent objects or obstructions therein and those who have not the right to obstruct in any manner or for any time any part of the road. It also follows that the right to the use of the right of way for purposes other than travel carries with it the right to do many things that a trespasser, or what might be called an intruder, would not have the right to do, and in determining whether or not an object or thing placed in the right of way may be the subject of an action for damages, it is always important to find out whether it was put there by a person having the right to do so, or by a trespasser or intruder. For example, a farmer desiring to build a fence might safely put on the right of way outside of the traveled part the material he intended to use in erecting the fence, and so an abutting property owner might without liability place on the right of way so as not to obstruct the traveled part of the road material to be used in the erection of a building. Likewise telegraph, telephone, electric light and other public service corporations that have secured the right to do so, may place poles, wires, tool boxes and other implements necessary in the construction or repair of their work on the right of way in such a manner as not to interfere with travel. Indeed it is scarcely possible to travel any of the principal roads in the state without seeing frequently on the side of the road in the right of way material and implements being used or intended to be used by abutting property owners or public service corporations. Nor does the mere fact that many or perhaps all of the things so placed in the right of way may be calculated to frighten reasonably gentle horses create any liability on the part of the persons so placing them if the act is otherwise free from negligence.

It may, therefore, be said that whether liability attaches to a person who places objects and things on the side of a road depends largely upon whether or not he had the right to do so, rather than on the character or shape or kind of object that was placed, as a person who had the right to do so might with complete freedom from liability put an object or thing on the side of the road which, if put there by a person not having the right, would be a nuisance.

It is also very evident, and would seem to necessarily follow from what we have said, that the sole fact that an object on the side of the road is calculated to frighten a reasonably gentle horse is not the standard by which the liability of the party placing it is to be measured in an action by the person who was injured by the fright of the horse. A rule like this would subject to continual apprehension and liability abutting owners and others having the right to place objects on the side of the road, as it is a well known fact that reasonably gentle horses at times become greatly frightened at objects that they see and pass without notice or fear day after day.

It is also manifest that it would not do to say that merely because there was something new or unusual about the appearance of an object placed on the side of the road by some person having the right to do so, that it should be treated as likely to frighten a gentle horse, and that the party placing it subjected himself to liability merely because of the newness or novelty of the thing. Modern inventions and discoveries are daily bringing into practical use many new implements and devices and many new kinds of material, and people are not to be subjected to liability merely because, in the conduct of their business, they use new and unusual things.

It is now a matter of common occurrence to see large bales of bright fencing wire, intended to be used by farmers in the erection of right of way fences, along the side of public roads, but because a horse might become frightened at a bale of wire when he would pass unnoticed a pile of fence rails, furnishes no reason why the farmer using the wire should be subjected to greater liability than the farmer using the fence rails; and so the liability of the owner of an automobile or a motorcycle, who leaves it standing by the side of the road, should not be greater than the liability of the man who

leaves a buggy or a wagon by the side of the road, although one vehicle might frighten horses much more than the other.

This line of reasoning, which we think sound, leads us to the conclusion that the telephone company, having, as it did, the right to erect its poles and string its wires along the right of way, did not incur any liability in placing, as it did, the coils of wire. This wire, although new and bright, and in the right of way of the road, was the kind of wire commonly used by telephone companies, and there was nothing in the size or appearance of these coils to attract unusual attention.

To say that a telephone company in the erection of a new line must be subjected to liability because, in the progress of its work, it finds it indispensable to have coils of wire and other implements and material on the side of the road that may frighten reasonably gentle horses, would be to virtually deny telephone companies the right to carry on, in the ordinary way, their business, or else subject them to unreasonable expense and inconvenience in protecting every tool or implement or other thing that might at some time frighten some person's horse.

It is true, as argued by counsel for Mrs. Parsons, that the general rule in cases like this is, that it is for the jury to say whether the thing complained of was calculated to frighten a reasonably gentle horse, but this does not mean that every time a horse becomes frightened at some object rightfully placed on the side of the road the question must be left to the jury, or that in every case in which the jury find that the object was calculated to frighten a reasonably gentle horse, the judgment must stand. It is only the right of the jury to pass on questions like this when there is reasonable ground for difference of opinion, under all the circumstances, whether the object was lawfully or unlawfully placed where it was and was of such size, shape or appearance as would be reasonably calculated to frighten a horse. A horse might become frightened at any kind of a tool or implement of the simplest kind placed on the side of the road by a person having the right to so place and use it. It is a matter of common knowledge on the part of every person familiar with reasonably gentle horses, and especially old family horses, that they are likely to take fright at any time or place at the most trivial and unexpected things.



Many of them scare every time they go by piles of rock on the side of the road, although they pass them day after day for months; they will at times scare at pieces of paper, planks, ponies, hogs, cattle and other things that they see and associate with day after day, so that no person can tell what a horse will, or will not take fright at; and, therefore, it would be out of the question to say that everything that a horse might scare at would furnish the basis of an action for damages.

In *Simons v. Maine Telephone & Telegraph Co.*, 104 Me., 440, the telephone company, in constructing its line, placed in the street near the sidewalk reels of lead pipe three feet in length and four feet in diameter that frightened a horse being driven by. In holding that the company was not liable the court said:

"Having the right to erect and maintain its poles and string on them its wires and cables where it did in the street, the company had the concomitant right to use suitable appliances therefor and in reasonably needful places. For the work of stringing on the pole the wires and lead pipes enclosing them, some kind of a reel was appropriate and needful, and it needed to be in the street in the line of the poles. There is no suggestion in the evidence that any other kind of a reel, larger, smaller or of different shape or color, would have been less likely to frighten horses, or that it could have been so located as to be still serviceable and less startling to horses. \* \* \* The reel and the lead pipe being otherwise lawfully where and when they were in the street, the mere fact that they were likely to frighten horses unaccustomed to them did not make their presence there unlawful. The consequences of the fright must there, remain where they fell."

In *Lane Bros. Co. v. Barnard*, 111 Va., 680, 69 S. E., 969, a horse became frightened at an engine being operated in the road by a person who had the right to operate it, and in holding the owner of the engine not liable to the person injured by the fright of the horse, the court said:

"Although machinery and the noises made in operating it are of such a character as to frighten horses, this alone does not impose a liability; therefore, the defendant in this case, being in lawful occupation of the road with its machinery, and using it for a lawful purpose, was not responsible for the appearance of the machinery, or for the noise or other occurrences usual in its opera-

tion. Injury alone is not sufficient to support an action arising from the alleged negligence of the defendant. There must be a concurrence of wrong and injury. If a person does an act which is not unlawful in itself, he can not be made liable in damages for the resulting injury, unless he does the act at a time or in a manner or under circumstances which will render him chargeable with a want of proper regard for the rights of others."

Other instructive cases generally supporting the principles announced are *Elam v. City of Mt. Sterling*, 132 Ky., 657; *Cincinnati Railroad Co. v. Commonwealth*, 80 Ky., 137; *Piollet v. Simmers*, 106 Pa. State, 95, 51 Am. Rep., 497; *Macomber v. Nichols*, 34 Mich., 212, 22 Am. Rep., 522; *Loberg v. Town of Amherst*, 87 Wis., 634, 41 Am. St. Rep., 69; *Kingsbury v. Deadham*, 13 Allen (N. Y.) 186, 90 Am. Dec., 191; *Lynn v. Hooper*, 93 Me., 46, 47 L. R. A., 752.

Did the fact that the wire was left at the place where it was put for several days, convert into an actionable wrong that which was lawful in its origin? We think not. As stated, the evidence shows that work had been commenced in stringing the wire, in connection with which the coils in question were to be used, but had not progressed to the point where this wire was located. Of course these two small coils of wire could have been easily and conveniently moved and replaced at any time, or immediately before being used, but, considering the size of these coils of wire, it cannot fairly be said that the mere fact that they were permitted to remain on the side of the road for the time mentioned created a liability that except for this would not have existed. There was nothing in the appearance or size of these coils of wire that would cause a person of reasonable prudence to anticipate that they would frighten horses. Of course, what is a reasonable time, in matters like this, must depend largely on the nature and quality of the thing, and on how long it has been permitted to remain where it was put and the right of the person to locate it, but when a telephone company, in stringing its wires, places, as it has the right to do, small coils of wire along the road, to be used as the work progresses, of such a size, nature and quality as not to make it actionable negligence to place them by the side of the road, it would be extending beyond all reasonable limits the doctrine of liability to say that because the wire was left a day or a week longer than it might have been, the company is liable, when it

would not have been if it had used the wire on the day or the day following the day it was placed there.

Upon the whole case we are of the opinion that the jury should have been directed to find a verdict for the telephone company, and if there is another trial, and the evidence is in substance as it was on the last trial, the court will so instruct the jury. The judgment in the damage case is reversed for proceedings in conformity with this opinion, and the judgment in the case seeking a new trial is affirmed.

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### **Louisville & Nashville Railroad Company v. A. Waller & Company.**

(Decided September 25, 1913).

#### **Appeal from Henderson Circuit Court.**

1. **Carriers—Demurrage Charges—Right of Consignee to Set-off Claim for Damages.**—In an action by a common carrier to recover demurrage charges, the consignee pleaded and proved in defense of the action that the demurrage charges resulted from a failure of the carrier to deliver to it cars, which, if delivered, would have prevented the creation of demurrage fees, and this defense was held valid.
2. **Carriers—Demurrage Charges—Right of Consignee to Set-off—Damages.**—In this case the claim for demurrage charges asserted by the carrier was based on rules and regulations adopted by the railroad companies of this State many years ago, no State or Federal statute or regulation made in pursuance thereof being relied on, and so the question whether the consignee would have the right to off-set demurrage charges by a claim for damages if the demurrage charges arose and were asserted under a Federal statute or regulation made in pursuance thereto, or by virtue of the fact that they appeared in its public tariff rate, is not decided.

J. C. WORSHAM, TRABUE, DOOLAN & COX and CHAS H. MOORMAN for appellant.

CLAY & CLAY and DORSEY & DORSEY for appellee.

#### **OPINION OF THE COURT BY JUDGE CARROLL—Affirming.**

The appellant as plaintiff below brought this suit against the appellee to recover the sum of \$410 for car service demurrage. It is averred in the petition that "the plaintiff, and other railway companies in Kentucky,

some years ago, established rules for the handling of their freight cars with a view to promote the speedy loading and unloading of same, to facilitate traffic and commerce, and enable them to keep their cars in use, which rules were well known to the defendant and had been acted upon by it in its dealings with the plaintiff prior to the beginning of the claim herein set up. By said rules, when cars were furnished to the patrons of the road to be loaded or unloaded, it was provided that for every twenty-four hours, or fraction thereof, which each car was held beyond forty-eight hours, excluding Sundays and legal holidays, after it was placed for the use of the patron, he should pay \$1.00 to the road furnishing the car.

"On the 23rd of September, 1906, and on various dates thereafter up to and including April 9, 1907, the plaintiff furnished to the defendant at its special instance and request various cars loaded with freight for the defendant, but it failed to unload them within the time prescribed by said rules, and held them for such time beyond the forty-eight hours it was entitled to hold them as to amount in the aggregate to 410 days, whereby the defendant became indebted to the plaintiff in the sum of four hundred and ten dollars for the detention of said cars. The defendant was duly notified of the placement of said cars for unloading, but notwithstanding held them beyond the time allowed, as above set forth."

In an answer, counterclaim and set-off, the appellee set up its defense in six paragraphs, and while not controverting the claim sued on, sought to avoid a recovery by the matter asserted in its counterclaim and set-off.

The lower court sustained a demurrer to the first, second, third and fourth paragraphs of the answer and counterclaim, but overruled the demurrer to the fifth and sixth paragraphs in which it was averred that the "Defendant states that the demurrage, on account of which the plaintiff sues, accrued through no fault of this defendant, but accrued solely and only because of the failure and refusal of the plaintiff to furnish it cars in which to ship its grain. That its elevator was full, and it could not unload the grain from the cars in question until it was furnished cars in which to ship the grain in the elevator, which the plaintiff failed and refused to furnish, though requested so to do, and it also refused to permit the defendant to unload and reship in the same cars for which demurrage is charged. If it had

furnished such cars or permitted defendant to unload and reship in the same cars, this defendant would and could have unloaded the grain in the cars on account of which this action is brought within the time allowed for that purpose, and said demurrage would not have accrued.

“The cars used for which demurrage is charged in the petition were weak, dilapidated, and of an inferior quality, such as were not fit to use, and could not be used and were not used in the regular course of the plaintiff’s business. The said cars were shop cars, and were only used by the plaintiff to haul the grain from the railroad wharfboat on the Ohio River to the elevator of the defendant, and to the Henderson Elevator, a distance of about half a mile. Said cars were such as the plaintiff, under the rules mentioned in the petition, had no right to charge demurrage for, and for this reason this defendant is not liable for said demurrage, and the plaintiff has no right to charge for or to collect said demurrage.”

On the issues presented by the petition and in the fifth and sixth paragraphs of the answer, which was controverted by a reply, the parties went to trial before a jury. During the progress of the trial, which took place four years after the answer had been filed and the demurrer sustained to the paragraphs mentioned, and after the evidence for the appellee had been heard, the appellant moved the court to suspend the trial and permit it to prepare and file an amended reply, setting up that during the time the charges for demurrage sued for, accrued “there was an unusual, unforeseen and unprecedented demand for cars on plaintiff’s line of railroad; that said condition existed on all railroads throughout the United States at said time; that the plaintiff had on hand at such times a sufficient equipment to take care of and handle its usual and ordinary business; that during said months it furnished the defendant with its pro rata proportion of plaintiff’s equipment of cars; and that any failure, refusal or inability to furnish defendant more cars than it did furnish it was due to the said unprecedented, unusual and unforeseen press of business.”

The bill of exceptions shows that the proposed amendment was not reduced to writing or tendered, and the motion to give time to prepare and file it was overruled

on the ground that the issues should have been made up earlier.

After the evidence was in, the court instructed the jury in substance that it was the duty of the appellant, upon reasonable notice, to furnish appellee a reasonably sufficient number of cars to supply its demand, and if they believed from the evidence that during the time the items of demurrage accrued the appellant, after reasonable notice, failed to furnish the required cars, and by reason of such failure it was unable to unload and release the cars upon which demurrage was charged, they should not allow any demurrage on such cars as were held on account of the failure of the appellant to supply requested cars.

The only instruction offered by appellant was based on the amended reply it proposed to, but never filed, and of course the instruction was properly refused. The jury returned a verdict in favor of appellant for an item of demurrage amounting to six dollars about which there was no dispute, and complaining of the rulings of the lower court that in effect denied it the right to recover the full amount claimed, it brings the case here for review.

No excuse was offered for the long delay in tendering the amended reply proposed to be offered during the trial, and we are not disposed to say that under the circumstances the trial court abused its discretion in refusing to give time during the trial to prepare the suggested reply.

With this matter out of the way the only issue in the case—as the amount of the claim for demurrage was admitted—was the right of appellee to defeat the demurrage by the defense that it was occasioned by the failure of the appellant to furnish it sufficient cars to enable it to unload the cars upon which demurrage was charged before any demurrage accrued, and this really resolves itself into the question whether or not the consignee has the right in a suit by a carrier for demurrage fees to offset the claim by damages that he has suffered by the negligence of the carrier connected with its claim for demurrage or its failure to perform a duty which if performed would have prevented the accrual of demurrage charges. Assuming, therefore, that the defense asserted by appellee was valid and made out by the evidence, and that the issue arising on this defense was properly submitted to the jury as we may do upon the authority of

I. C. R. Co. v. River & Rail Coal Co., 150 Ky., 489, we shall only consider the question relating to the right of a consignee to off-set demurrage charges by a valid claim that he has against the carrier.

In disposing of this question it is important to keep in mind the fact that the claim for demurrage sued on was not based directly or inferentially upon any Federal or State statute conferring the right to make this charge, or upon any rule or regulation of the carrier made under authority of any such statute, nor was the charge contained in or made a part of its public tariff rates, but was rested solely on certain rules and regulations adopted perhaps twenty years ago by railroad companies doing business in the State, by which they agreed that certain fixed demurrage charges should be made against consignees for their failure to release within a specified time cars consigned to them. This rule or regulation of the railroad companies was held to be valid and enforceable by this court in *Kentucky Wagon Manufacturing Company v. Ohio & Mississippi Railway Co.*, 98 Ky., 152.

This being the basis of the action, it does not seem necessary that we should consider the nature of demurrage charges in their relation to or as a part of the charge for transportation, or what the rule should be if the charges were contained in or made a part of the public tariff rates of the carrier, or were made pursuant to any Federal or State statute or rule or regulation made thereunder, or whether if they were so made it would be permissible to defeat them by a claim for damages, such as is asserted in this case. Nor has the Interstate Commerce law any application to the case, as it was not in any manner pleaded or relied on in the lower court by the railroad company.

We may, however, observe in passing that in an opinion by the Interstate Commerce Commission, in the case of *Crescent Coal & Mining Co. v. Baltimore & Ohio Railroad Co.*, Vol. 20, Interstate Commerce Commission Reports, it was said that "it has been uniformly held by this commission that a shipper or consignee may not be required to pay a demurrage charge unless the carrier's tariff provided for the same in clear and specific form and manner." It would, therefore, seem that if the railroad company had relied on the Federal statute or any rule or regulation of the Interstate Commerce Commission to entitle it to recover in this case, it must

have failed, because of the failure to set out that the demurrage charges were published in its tariff sheet.

As the rights of the parties are to be settled independent of recent Federal legislation, and such rules and regulations as may have been established thereunder and according to principles that were formerly well established, we have no difficulty in adjudging that the consignee in this case had the right to assert against the charge for demurrage the claim for damages set up in this counterclaim. In *Louisville & Nashville R. R. Co. v. Empire State Chemical Co.*, 189 Fed., 174, the railroad company brought an action against the chemical company to recover demurrage charges. In its answer the chemical company set up two defenses, one was that the railroad company over its protest delivered cars on which demurrage was charged to it in such large quantities that it could not unload them expeditiously or within the time allowed to save it from demurrage fees, and the other was that the railroad company failed to furnish it sufficient cars to enable it to carry on its business, to its damage in a large sum. In considering these defenses the court said that the first one stated a good defense against the claim for demurrage fees, but that the second did not because it was not authorized by the Georgia practice. It appears from the opinion that in disposing of these questions no doubt was intimated of the right of a consignee to assert a valid claim against demurrage fees.

In *Missouri Pacific Ry. Co. v. Peru-Van Zant Implement Co.*, 73 Kansas 295, 87 Pac., 80, the court, after considering numerous authorities, said:

"Where a common carrier becomes liable to the consignee of goods for damages to the property received in transit and the amount of such damages equals or exceeds the freight bill on the damaged goods, the lien of the carrier is thereby extinguished and the consignee is entitled to the possession of such goods without payment of freight, and in such a case refusal of the carrier to deliver the goods to the consignee upon demand constitutes a conversion."

In *Dyer v. Grand Trunk Railway Co.*, 42 Vt., 441, 1 Am. Rep., 350, in holding that a shipper had the right to set off against a charge for transportation a claim for damage to the goods received in transit, the court said:

"There would seem to be no good reason why the liability of the carrier to the freighter for the damage



accruing through his fault, in the carriage of the property, should not be asserted and determined by way of defense to his claim for freight, as well as by a cross action for such damage."

In *Boggs v. Martin*, 13 B. Mon., 238, in sustaining the right of a consignee to set-off a claim for damages growing out of injury to the goods by the negligence of the carrier against the lien of the carrier for the freight charges, the court said:

"If the carriers were liable on account of any damage the goods had sustained, there seems to be no good reason why they should be permitted to recover the full amount of the compensation that they would have been entitled to if their contract had been strictly complied with and the consignee compelled to resort to a cross action to obtain redress for injury to the goods.

\* \* \* The consignee in the present case had a right to prove, for the purpose of reducing the amount of freight due to the carriers, that the articles had not been delivered in good order, \* \* \* and had a right to introduce proof to show the extent of the damage to the goods for the purpose of reducing the amount of the freight actually due or making it appear that nothing was due on that account, thereby manifesting that the defendants had no right to the possession of the goods."

In *Hutchinson on Carriers*, third edition, section 799, the rule is thus announced: "The party liable for the freight, however, when sued, may set up, in answer to the claim, any breach by the carrier of his contract, and will be allowed to set off any loss or damage to the goods for which he is liable, or sustained by him in consequence of unreasonable delay in their carriage or delivery." To the same effect is *Elliott on Railroads*, Vol. 4, Sec. 1567a.

Many of the authorities we have cited relate to the right of a consignee to set off his claim for damages against the charge for freight, but if this is allowable, as the uniform current of authority shows it is, there can be no doubt of the right of a shipper to set off his claim for damages against a charge asserted for demurrage, which can certainly occupy no better attitude than a claim for transportation fees.

The judgment is affirmed.

**Woodford v. Commonwealth.**

(Decided September 25, 1913).

**Appeal from Jefferson Circuit Court  
(Criminal Division).**

1. **Larceny—Taking and Carrying Away Different Articles at Different Times—Instructions.**—While two larcenies cannot be added together so as to sustain the charge of grand larceny, the evidence connects appellant with taking two automobile tires worth \$40.00 apiece, and whether he made one or two trips for them he was guilty in either event. For these reasons the objection to the instruction is not well taken. The instruction directing his conviction if the jury believed he "unlawfully and feloniously, took, stole and carried away the various articles enumerated in the indictment of the aggregate value of \$105.00, or of any of said property of the value of \$20.00 or more."
2. **New Trial—Newly Discovered Evidence—Affidavit Unsupported.**—A motion for a new trial on the ground of newly discovered evidence should be supported by the affidavit of the witnesses that they will so state, or by some other evidence than the affidavit of the defendant.

AL. M. MARRET for appellant.

JAMES GARNETT, Attorney General; D. O. MYATT, Assistant Attorney General, for appellee.

**OPINION OF THE COURT BY JUDGE NUNN—Affirming.**

The appellant was indicted and convicted of grand larceny. He was charged with stealing from Dr. Sanders, "two automobile tires of the value of \$40 a piece, and one automobile tire of the value of \$15, and two inner tubes of the value of \$5 a piece," and of the aggregate value of \$105.

The court instructed the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendant before the finding of the indictment unlawfully and feloniously took, stole, and carried away the various articles enumerated in the indictment, "of the aggregate value of \$105, or any of said property of the value of \$20, or more" they should find the defendant guilty as charged.

Appellant claims that this instruction was prejudicial and erroneous, because under it the jury could find him guilty of grand larceny although they might believe that the articles were taken at different times, and that

he took nothing at any time worth as much as \$20. In other words, he objects that the instruction directed the jury to convict him if the aggregate value of the articles taken, although at a number of different times, was more than \$20.

This instruction is almost identical to one condemned in the case of *Weaver v. Commonwealth*, 27 Ky. L. R. 743, 86 S. W., 551, and we adhere to the doctrine of that case to the effect that two larcenies cannot be added together so as to sustain the charge of grand larceny. "Petty stealing by being often repeated is not raised to the crime of a felony." But there is this radical difference between the case at bar and the one cited.\* \* \* Weaver was charged with taking and carrying away numerous articles of wearing apparel and other personal property belonging to Dr. Reynolds of the aggregate value of about \$1,000. The evidence disclosed that the articles were taken at intervals and by different persons, but Weaver had been seen to take only a pair of silk stockings. The value of none of the things taken was shown separately. In the case at bar the proof shows pretty clearly that appellant was guilty of larceny, and connects him with the two automobile tires worth, according to the proof, \$40 a piece. In fact, he is not directly connected by the proof with the taking of any of the other articles mentioned having a less value than \$20. So that he was convicted for the larceny of the two tires, the value of either one of which exceeded \$20, and whether he made one or two trips for them he was guilty in either event. As to whether the goods were taken at intervals, only one witness testifies, and that is Dr. Sanders. He says they were all taken at the same time. Perhaps his means and facilities for knowing this fact were faulty, and this could have been developed upon cross examination, but he was asked no other questions on this point. For these reasons we are of opinion his objection to the instruction in this case is not well taken.

His second complaint is the refusal of the lower court to grant him a new trial on the ground of newly discovered evidence. This new evidence he claims to be able to produce tends to show the great length of time the two tires had been used, and that, considering their use, they would be rated as second hand tires; and also that they were worth less than \$20. While the new evidence offered is an opinion as to the value of the two tires, and this was a pertinent issue upon the trial, yet

he does not name a single witness who would swear they were worth in the aggregate less than \$20 at the time they were stolen, and appellant's affidavit is unsupported by the affidavit of any other witness who would give such testimony. This was necessary under the ruling in *Bowling v. Commonwealth*, 148 Ky., 9, where a new trial was refused because "he did not support his affidavit by their affidavit that they would so state, or by the testimony of any other person."

Furthermore, while stating that he did not know of this evidence at the time of trial, he does not state sufficient reasons why he did not, or could not have known of its existence at that time.

Appellant also complains that he was not permitted to prove his good reputation for honesty. Passing the point as to the form and competency of his questions, it seems that he made no avowals as to what he expected his witnesses' answer would be, and upon this state of the record there is nothing for us to consider.

The judgment of the lower court is therefore affirmed.

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### **Thompson's Administrator v. Illinois Central Railroad Company, et al.**

(Decided September 25, 1913).

#### **Appeal from Muhlenburg Circuit Court.**

**Railroads—Trespasser—Action for Damages—Evidence—Peremptory Instruction.**—In an action by the administrator of a trespasser to recover damages for his death, based on the failure on the part of the engineer to use ordinary care to avoid injuring the decedent after his peril was discovered, evidence examined and held insufficient to take the case to the jury.

WALTER WILKINS for appellant.

TAYLOR & EAVES, TRABUE, DOOLAN & COX, BLEWETT LEE, C. L. SIVLEY and BROWDER & BROWDER for appellees.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

Plaintiff, D. M. Thompson, as administrator of James Nelson Thompson, deceased, brought this action against the defendants, Illinois Central Railroad Company and its engineer, Sam Lawther, to recover for the

death of his intestate. At the conclusion of the evidence for plaintiff the court directed a verdict in favor of defendant. Judgment was entered accordingly, and plaintiff appeals.

The evidence for plaintiff is as follows:

Alfred Armstrong testified that he, Melvin Crumbaker and the decedent, James Nelson Thompson, all of whom lived in Central City, were walking along the defendant company's tracks between Milwood and Caneyville, in Grayson county, Kentucky. Growing tired, they sat down on the end of the railroad ties to rest. Thompson and Crumbaker sat down first, and soon went to sleep. There was a tie or two between them. Witness dropped his knife, and after looking for it he too sat down one or two ties above them. It was then about day-light on the morning of August 28, 1911. While they were asleep and sitting in a stooped position on the end of the ties close to the track, passenger train No. 132 came along and struck Thompson and Crumbaker. The first thing he knew he was upon the bank of a small cut near the railroad track. He was asleep when the train struck the other two boys, and did not see them at that time and did not know what position they were in. The train knocked the other two boys down the track some distance. The train ran past them and stopped with the baggage car near them.

George White, who lived about 30 steps from the railroad, testified that he was standing on his porch at the time the train passed. He heard the train whistle at his gate as if something was on the track, and saw the train stop. He went to where the boys were struck by the train. The train did not slacken its speed when it commenced whistling. The distance from the gate to the telephone pole where the train commenced whistling was, by actual measure, 158 1-3 yards, or 475 feet, from the place where the boys were struck. It was after day-light when the accident occurred, and the train was going up grade.

Mrs. George White, the wife of George White, testified that she saw the train before it struck the boys, and saw it stop. The bell was ringing and the whistle blowing so much that she knew there was trouble. The train continued to whistle from the time it began until it stopped.

Tom Stanfield, a brakeman, who had had twelve months' experience in running on the Illinois Central

Railroad and four years' experience on the Rock Island Railroad, but who had not been in the railroad business for about twelve years, testified that the grade at the point of the accident was, in his opinion, from 60 to 80 feet per mile. Upon being asked the schedule time of the train, he did not know, but upon having his memory refreshed, he supposed about 23 miles per hour. He did not measure the grade in any way. In answer to the question "In what distance could an engine hitched to this passenger train of three coaches, going up Millwood hill, a grade of sixty or seventy feet per mile, and running at the rate of twenty-three miles per hour, be stopped?" witness answered: "I suppose it could be stopped in 75 or 100 yards—I would think, going up that hill." Witness further stated that if the train was running at the rate of 45 miles per hour he supposed it would require a greater distance, but did not know exactly what distance would be required. Sam Lawther, the engineer in charge of the train on the day of the accident, testified that his train was running at the rate of 45 miles per hour, and that he blew the whistle of his engine when he first saw them. Tom Stanfield was then recalled by the plaintiff, and being asked in what distance could an engine pulling a baggage and two passenger coaches, running at the rate of 45 miles an hour, up a grade of 60 to 90 feet a mile, be stopped, answered: "That is pretty hard to say, what distance it could be stopped at that rate of speed up grade, but it looks like it could be stopped in 125 or 150 yards, up that grade." He further said that in case of an emergency it looked as if it could be stopped in three car lengths.

As the accident occurred out in the country, it is admitted that the decedent and his companions were trespassers, and the defendant owed decedent no duty except to use ordinary care to avoid injuring him after his peril was discovered. Plaintiff's case, therefore, depends upon whether or not there was sufficient evidence on this point to take the case to the jury.

It is earnestly argued that as the proof shows the engineer began to give the alarm signals when he saw the boys, and furthermore that it was possible to stop the train in from 75 to 100 yards if going at a speed of 23 miles an hour, and from 125 to 150 yards if going at 45 miles an hour, there is sufficient evidence to take the case to the jury. There is practically no evidence, how-

ever, to the effect that the train was running at the rate of 23 miles an hour. The only evidence to that effect was the statement of the witness Stanfield that he supposed that was the schedule time, after counsel for the plaintiff asked him the question which suggested the answer expected.

Furthermore, the schedule time of a train is the regular time, including the time consumed in stopping at stations. Therefore, the schedule time of the train is by no means conclusive of its actual time. The actual time is generally somewhat in excess, and frequently far in excess, of the schedule time. In this case the only direct evidence of the actual speed of the train is the statement of the engineer that it was going at the rate of 45 miles an hour. While the boy who was not injured says that the intestate and the other boy went to sleep in a stooping position, there is no evidence tending to show their position at the time that the train actually struck them. The engineer says that when he saw them he immediately sounded the alarm. The train was moving very rapidly. The boys were only about 158 yards distant. The act of ringing the bell and blowing the whistle necessarily consumed some time. Furthermore, the law did not require the engineer to apply his brakes until he had given the alarm, and it was then reasonably apparent to a person of ordinary prudence, situated as he was, that the boys were unconscious of the approach of the train. As a matter of fact, the train did stop with the baggage car near the boys. Giving full effect to the evidence for plaintiff, though it bears the ear-marks of speculation rather than of sound judgment, it merely tends to prove that the train could have been stopped between the point at which the engineer saw the boys, and the point at which the accident occurred. It does not show that after the lapse of time necessarily consumed in giving the alarm signal, and after it became reasonably apparent to a person of ordinary prudence, situated as the engineer was, that the boys were unconscious of the approach of the train, he could, in the exercise of ordinary care, with the means at his command, have stopped the train in time to avoid injuring the intestate. *Reynolds' Admr. v. C., N. O. & T. P. Ry. Co.*, 148 Ky., 252; *Creager's Admr. v. I. C. R. R. Co.*, 134 Ky., 543. It follows that the peremptory instruction was properly given.

Judgment affirmed.

**Wash v. Noel.**

(Decided September 25, 1913).

**Appeal from Franklin Circuit Court.**

**Appeal—What Not Final Order.**—An order overruling a demurrer to an answer, but not disposing of the action, is not final.

J. HUNT JACKSON for appellant.

POLSGROVE & GAINES for appellee.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—**  
**Dismissing appeal.**

This is an appeal by the plaintiff in the action from an order of the court overruling his demurrer to the defendant's answer. Such an order is interlocutory, not final. *Alexander v. DeKermel*, 81 Ky., 345. No judgment having been entered disposing of the action the appeal must be dismissed and it is so ordered.

Appeal dismissed.

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**Price v. Russell.****Coleman v. Morgan.**

(Decided September 26, 1913).

**Appeals from Logan Circuit Court.**

1. **Elections—Primary—Contest—Time of Instituting.**—Under the primary election law, the five days allowed for instituting the contest, must be counted from the issuing of the certificate, including the day on which the certificate is issued.
2. **Elections—Notice of Contest—Service of.**—The notice of contest must not only be put in the hands of the sheriff within five days, but it must be served on the defendant within that time, unless he absents himself or otherwise prevents the service. If the notice is not served in time, the proceeding cannot be maintained.
3. **Trial—Special Judge—Presumption that Governor Acted Properly in Appointing.**—It will be presumed that the Governor acted properly in sending a special judge to try a case nothing else appearing. Ordinarily the clerk may notify the Governor when notified by one of the parties that the parties cannot agree on an attorney to preside.



4. **Elections—Primary—Judgment of Court of Appeals is Final—Correction of.**—In primary election contests the judgment of the Court of Appeals is final when entered and the result will be certified directly to the proper officers. But the court will correct any error thereafter on reasonable application.

**J. F. VANARSDALL, J. T. WILSON, W. W. STEPHENSON** for appellant Coleman.

**S. R. CREWDSON and TRIMBLE & BELL** for appellant Price.

**C. E. RANKIN, E. H. GAITHER and E. M. HARDIN** for appellee Morgan.

**G. T. FINN** for appellee Russell.

**OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Affirming.**

These two appeals involving the same question will be determined together. Section 28 of the Act of March 5, 1912, providing for primary elections, contains the following provision as to the contesting of such elections:

“Any candidate wishing to contest the nomination of any other candidate who was voted for at any primary election held under this act shall give notice in writing to the person whose nomination he intends to contest, stating the grounds of such contest, within five days from the time the Election Commissioners shall have awarded the certificate of nomination to such candidate whose nomination is contested. Said notice shall be served in the same manner as a summons from the circuit court, and shall warn the contestee of the time and place, when and where the contestee shall be required to answer and defend such contest, which shall not be less than three nor more than ten days after the service thereof.” (See Acts 1912, p. 71.)

In the first case Vernon Price instituted a contest against George C. Russell. They were each candidates for the Democratic nomination for county clerk of Logan county at the primary election held on August 2, 1913. The certificate of nomination was awarded to Russell on August 5; the notice of contest was delivered to the sheriff at 4:10 p. m. on Saturday, August 9th, and he not finding Russell on that day, delivered a copy to him at 8:30 a. m. on August 11th.

In the second case Clel Coleman sought to contest the nomination of John Morgan, as the Democratic can-

didate for sheriff of Mercer County. The certificate of nomination was issued to Morgan on August 11, 1913. The notice of contest was placed in the hands of the sheriff at 5:30 p. m. on August 15, and was served by the sheriff on August 16.

There is no contention in either case that the defendant absented himself or in any way obstructed the service of the notice. The single question to be determined in each case is, was the notice in time? The circuit court dismissed both proceedings on the ground that the notice was not in time; and the contestants appeal.

It will be observed that in each case, if the day on which the commissioners awarded the certificate of nomination is counted the five days allowed by the statute expired before the notice was served. The rule is settled in this State by a long line of decisions that where time is counted from the day, the day is not included, but that where it is counted from an act, the day on which the act is done, is included. In *Batman v. Megowan*, 1 Met., 533, the court had before it a statute which required that notice of contest should be given within ten days after the board issued the certificate. The final action of the board occurred on the sixth of the month; the notice of contest was executed on the sixteenth. It was held that the day on which the commissioners acted must be counted and that the time for serving the notice expired on the fifteenth. That case has been followed uniformly since. (*Long v. Hughes*, 1 Duv., 388; *White v. Crutcher*, 1 Bush, 473; *Newton v. Ogden*, 126 Ky., 106, *Lowry v. Stotts*, 138 Ky., 253, and cases cited.)

It is insisted that the statute which was there before the court required the notice to be given within ten days after the final action of the board, while the statute here in question requires the notice to be given in five days from the time the election commissioners shall have awarded the certificate. But we cannot see that there is any substantial difference in the statutes. The awarding of the certificates is an act. To say that the notice must be given in five days from the time the election commissioners awarded the certificate, is to say that it must be given within five days after the act. The sense is not changed by the use of the word "time." The meaning would be precisely the same if the statute had required notice to be given within five days after the election commissioners shall have awarded the certificate.

It is also insisted that the contestant should not be prejudiced by the failure of the sheriff to execute the notice on the day he received it; that when he prepared his notice and gave it to the sheriff to execute, he had done all he could do. It is pointed out that when a petition is filed, and summons issued in good faith, an action is begun, and that the failure of the sheriff to serve the summons promptly does not affect the plaintiff. But the right to contest a primary election comes entirely from the statute, and the Legislature in conferring the right could confer it upon such terms as it saw fit. It has seen fit to make the service of notice in five days, a condition precedent to a contest; for notice in writing of the contest is not given to the person whose nomination is contested until the notice is served on him. The statute is unambiguous. The giving of the notice in writing to the person whose nomination is contested within five days is a condition precedent to the right of contest. If the notice is not given the right fails. The Legislature might have provided for the filing of a petition in five days, and the service of a summons issuing on it, but it did not do so, and we are powerless to add to the words of the statute. (15 Cyc., 402.)

If the contestee should conceal or absent himself, or in any other way obstruct the service of the notice, a different question would be presented; for a man is never allowed to profit by his own wrong, and he who prevents the execution of a process in time, will not be heard to object that the process was not served sooner.

In the second case, objection is made that the circuit judge who tried the case by direction of the Governor, had not the power to act. It is insisted that before the Governor can designate a judge to try a case, where the circuit judge of the district can not preside it must appear that the parties are unable to agree upon an attorney to act as judge. Section 2 of the Act of 1912 is in these words:

"In the absence of the regular judge of any circuit court in this Commonwealth, except the courts of continuous session as mentioned in the first section hereof, or when he cannot preside in any particular case or cases, if the parties cannot agree upon an attorney who is present to act as judge, and who shall receive no compensation for his services, the clerk shall at once notify the Governor, who, in turn, shall immediately notify one of the circuit judges, mentioned above, who is not then

engaged in holding a regular or special term of court in his district, and it shall be the duty of said circuit judge so notified by the Governor, to hold the court, or try the case, and the judge so notified by the Governor shall have all the powers of a regular judge of said court." (Acts 1912, p. 413.)

There is nothing in the record to show that the action of the Governor was unwarranted, and we must presume that his Excellency acted properly. The primary act plainly contemplates that these election contests shall be speeded to a conclusion, and the clerk was not required to wait until the day of trial came, before acting. Ordinarily where he is notified by one of the parties that they cannot agree upon an attorney, and is requested to notify the Governor, he may properly give the notice; for if the parties desire to make an agreement on the subject, it is incumbent on them to do so.

The act provides that the circuit clerk shall transmit to the clerk of this court the original papers in the case; that the record when received shall be delivered immediately to the Chief Justice; that the case shall have precedence over all other business and shall be disposed of by the court as speedily as the exigencies of the case will admit; that if the issue is finally decided in favor of the contestee, or contestant, this fact shall be certified to the proper officer and that the name of the successful party shall be printed on the ballots to be used in the November election. If thirty days were allowed as in other civil cases for a petition for rehearing before the judgment becomes final, the manifest purpose of the statute would be defeated and the appeal would be in all cases an idle form; for this court adjourns for the summer vacation before the primary election and it does not meet until the third Monday in September.

We, therefore, conclude that the statute contemplates that the judgment of this court shall become final when the case is decided, and that the certificate as provided in the Statute shall then issue. No mandate issues as in other civil cases but the certificate is issued from this court. A mandate goes to the circuit court and that court may not in these cases convene before the election, so final action must be taken here. If any mistake is made or injustice done, the court will entertain a seasonable application for a modification of the judgment and will make such further orders as the ends of justice require.

Each of these contests having been decided in favor of the contestees an order will be entered in each case certifying this fact to the Secretary of State and to the county court clerk of Logan County in the first case and of Mercer County in the second case.

Judgment affirmed.

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### **Dave King and Edith King v. Commonwealth.**

(Decided September 26, 1913).

#### **Appeal from Daviess Circuit Court.**

1. **Bawdy House—Evidence of Reputation of House—Nuisance.**—In a prosecution against a defendant for keeping a bawdy house, evidence of the general reputation of the house, and that it had possessed for several years the reputation of being a disorderly house, is admissible, but it will not alone be sufficient to warrant a conviction, since there must be some evidence aside from reputation which corroborates the proof of reputation; and this may be either direct or circumstantial.
2. **Nuisance—Abatement of—Location of.**—It is not necessary to specify the location of a nuisance further than to show that it is within the jurisdiction of the court, unless it is desired to obtain an order of abatement, or the locality is an essential ingredient of the offense.
3. **Nuisance—Abatement of—When Location Must Be Set Out.**—Where the object desired by an indictment is an abatement of the nuisance, the location of the nuisance must be set out in the same manner as the place of a forcible entry, where restitution is to be awarded.
4. **Bawdy House—Indictment for Keeping—Location Indefinite.**—Where an indictment charged the defendants with keeping a bawdy house "on Mulberry Street in Owensboro, Kentucky," the location of the alleged bawdy house was not sufficiently definite to authorize the court to enter a judgment abating the nuisance.

LOUIS I. IGLEHEART for appellants.

JAMES GARNETT, Attorney General, and OVERTON S. HOGAN, Assistant Attorney General, for appellee.

#### **OPINION OF THE COURT BY JUDGE MILLER—Reversing.**

The appellants, Dave King and Edith King, were found guilty of maintaining a common public nuisance in Owensboro, and each of them was fined \$37.50. The nuisance consisted in the keeping of a bawdy house on

Mulberry street in the city of Owensboro. The circuit judge entered a judgment upon the verdict; awarded a *capias pro fine*, and further ordered and directed the defendants to abate said nuisance within five days and to keep it abated, and to cease keeping a bawdy house at said place, or anywhere in the city of Owensboro. The judgment further directed the sheriff to visit the premises of the defendants after the expiration of five days and inspect same; to ascertain whether or not said nuisance had been abated by the defendants, and report to the court at its next term whether it had been abated. The defendants were directed to permit the sheriff, or his deputy, to inspect the premises for the purpose of ascertaining whether they had complied with the order; and the action was continued on the order to abate the nuisance, and for a report of the sheriff, as above indicated. From that judgment the defendants prosecute this appeal under the authority of *Leitchfield Mercantile Co. v. Commonwealth*, 143 Ky., 162.

The appellants urge the two following grounds for a reversal of the judgment: (1) The court erred in refusing to instruct the jury at the conclusion of all the evidence to acquit the appellants; and (2), it erred in entering a judgment directing the appellants to abate the nuisance. We will consider these grounds in the order given.

1. The only evidence introduced by the Commonwealth in support of the averments of the indictment was to the effect that the reputation of the house in which appellants lived was bad, and that it had the reputation of being a bawdy house. This was shown by four policemen whose testimony was confined entirely to the general reputation of the house occupied by the appellants on Mulberry street.

The rule of evidence in cases of this character is not uniform in the different States. In 14 Cyc., 503, it is said:

"Under common law principles it would seem that evidence of the general reputation of a house would be inadmissible upon the issue of whether it is a bawdy house, and so quite a number of authorities hold; but very many authorities hold that the reputation of the house is admissible."

The first class of cases in which the common law principle is applied and the evidence of general reputation is held to be inadmissible, proceeds upon the

theory that the offense does not consist in keeping a house reputed to be a bawdy house, but in keeping one that is actually such. This rule is applied in Alabama, Illinois, Iowa, Maine, Maryland, Mississippi, New York, Oklahoma, and in the Federal courts. On the contrary, evidence of the general reputation of the house is admitted in Colorado, Dakota, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Minnesota, Nebraska, Pennsylvania, South Carolina, Texas and Wisconsin.

Evidence of general reputation was expressly held to be admissible in *Burton v. Commonwealth*, 4 Ky. L. R., 532. And in *Rhodes v. Commonwealth*, 10 Ky. L. R., 722, it was held to be competent for the Commonwealth to prove the general reputation or virtue of a woman who was seen frequently at the house. Under the Kentucky rule, therefore, such testimony was admissible.

This further question, however, arises: Is evidence of the bad reputation of the house alone sufficient to support the verdict?

In *Underhill on Criminal Evidence*, 2nd Ed., section 482, the author says:

"The reputation of the house as given in evidence may extend for two or three years prior to the earliest date alleged in the indictment provided it was during that time occupied by the accused, but proof that the premises mentioned in the indictment had possessed for several years past the reputation of being a disorderly house will not alone be sufficient to warrant a conviction, for there must be some evidence aside from reputation which corroborates the proof of reputation, and this may be either direct or circumstantial."

This rule seems to have the support of authority and reason, and in our opinion is the proper rule in such cases.

The Commonwealth therefore, having failed to support the evidence as to the bad reputation of the house with substantive testimony upon that point, it failed in its proof, and the circuit court should have directed an acquittal.

2. Did the circuit court err in entering a judgment of abatement?

Appellants contend that the judgment in this respect was unauthorized because the indictment does not accurately describe the location of the nuisance; it merely charges appellants with keeping a bawdy house "on

Mulberry street in the city of Owensboro, Kentucky." The verdict of the jury merely found the appellants guilty as charged in the indictment, while the judgment attempts to enlarge upon the indictment by reciting that the jury found the defendants guilty of maintaining a nuisance, to-wit, "a bawdy house in the city of Owensboro on Mulberry street at house No. \_\_\_\_\_."

In 29 Cyc., 1283, it is said:

"It is not necessary to specify the location of the nuisance, further than to show that it is within the jurisdiction of the court, unless it is desired to obtain an order of abatement, or the locality is an essential ingredient of the offense."

In *Commonwealth v. T. J. McGibben Co.*, 101 Ky., 199, the indictment charged the defendant with maintaining a nuisance, which consisted in collecting the refuse and offal from cattle fed at a distillery to such an extent as to corrupt the air and pollute the water of the South Fork of Licking River, into which it had been emptied. In the course of the opinion, the court said:

"The third objection to the indictment is that the object desired being an abatement of the nuisance, the location must be set out in the same manner as the place of a forcible entry where restitution is to be awarded (2 Bishop's Criminal Procedure, 866.) While it is entirely true that no order of abatement could be obtained unless the location were so given, such an averment is not necessary to the sufficiency of the indictment."

Again, in *Commonwealth v. City of Somerset*, 14 Ky. L. R., 238, the Superior Court held that while an indictment for a nuisance must describe the location of the nuisance with certainty, yet an indictment against a city for permitting a nuisance, which alleges the city permitted a certain street, naming it, to become filled with mud, stones and other material, which prevented public travel along said street, is sufficiently specific as to the location of the nuisance, as the fair inference is that the city had permitted the whole street to become a nuisance. It further held, however, that had the indictment charged that the city caused or permitted a nuisance "on" or "near" the street named, without further describing the location, it would have been defective.

And finally, in *Ehrlick v. Commonwealth*, 125 Ky., 742, where the indictment charged the defendant with the offense of maintaining a pool room to the common



nuisance and annoyance of all the good citizens of the Commonwealth, the court said:

"There was a judgment of abatement entered against appellant, requiring him to abate the nuisance found by the verdict of the jury and the judgment of the court. The object of criminal law is mainly to prevent crime. A common nuisance can be abated only at the suit of the Commonwealth, unless some members of the community suffers exceptional and peculiar damages from it. A way open to the Commonwealth is to proceed by indictment, as was done in this case, where, under a verdict of guilty, the Commonwealth is entitled as a matter of law and right to have the nuisance so found there-after abated. *Selfried v. Hays*, 81 Ky., 377; *Gates v. Blincoe*, 2 Dana, 158, 26 Am. Dec., 440; *Ashbrook v. Commonwealth*, 1 Bush, 140, 89 Am. Dec., 616. It is not adequate to leave the Commonwealth to repeated prosecutions.

"Appellant complains that the indictment is not clear and direct as to the offense charged. There is but one offense charged, and that is correctly stated in the accusatory clause of the indictment. To properly state the offense, the facts showing it must also be stated, and, *if an abatement is sought, a continuance of the nuisance must be alleged, as well, perhaps, as a description of the place where it is allowed.* *Commonwealth v. Enright*, 14 Ky. L. R., 894; *Commonwealth v. Megibben*, 101 Ky., 195; *Commonwealth v. City of Somerset*, 14 Ky. L. R., 238; *C. & O. Ry. Co. v. Commonwealth*, 88 Ky., 368."

See, also, 2 Roberson's Criminal Law, section 629, where the rule above announced is fully recognized.

We must conclude, therefore, that the judgment of the circuit court directing the abatement of the nuisance was not authorized under the averments of the indictment.

For the errors indicated the judgment is reversed, and the cause remanded for further proceedings.

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### **Brown v. Threlkeld's Guardian.**

(Decided September 26, 1913).

#### **Appeal from Crittenden Circuit Court.**

1. Action—Common Law—Submission to Court Without Intervention of Jury—Finding—Effect of.—Where a common law action is sub-

mitted without the intervention of a jury, the judgment of the trial court is entitled to the same weight as the verdict of a well-instructed jury, and cannot be reversed unless flagrantly against the evidence.

2. Ejectment—Finding of Court—Evidence—Sufficiency.—In an action of ejectment, evidence examined and held to sustain finding in favor of plaintiff.
3. Easement—Appurtenant—Steamboat Landing—Conveyance of—Right to Use and Occupy Other Lands of Grantor.—Where a grantor conveys a particular steamboat landing and certain described land to which it is appurtenant, the destruction of that land by erosion gives to the grantee no right to use and occupy other lands of the grantor for the purpose of landing boats.

L. H. JAMES and A. C. & V. Y. MOORE for appellant.

C. S. NUNN and JONES O. GILL for appellee.

OPINION OF THE COURT BY WILLIAM ROGERS CLAY,  
COMMISSIONER—Affirming.

R. W. Foster owned a large tract of land lying in Crittenden county on the Ohio River. A portion of it he devised to his nephew, Foster Threlkeld. Another portion he devised to his niece, Clara T. Brown. On February 24, 1903, Foster Threlkeld conveyed to his sister, Clara T. Brown, the following described property:

“The Hurrican Steamboat Landing with all its privileges, and described as follows: Beginning on the bank of the Ohio River thence SE course with the fence so as to include the new house to a line between Guess and Threlkeld, thence north course to Hurricane creek, thence down said creek to the Ohio River, thence down said river to the beginning.”

Subsequently, Foster Threlkeld died leaving surviving him an infant child, Foster Lee Threlkeld. During the year 1911 the Peoples Bank & Trust Company qualified as his guardian. Claiming that defendants, Clara T. Brown and her husband, Joe Brown, were wrongfully in possession of about a half acre of land known as the Tie Yard, plaintiff, Foster Lee Threlkeld, suing by his guardian, Peoples Bank & Trust Company, brought this action of ejectment against them to recover the property. The case was first tried before a jury, which returned a verdict in favor of plaintiff. For some reason the trial court granted a new trial. Subsequently the case was submitted to that court without the interven-

tion of a jury, and judgment rendered in favor of plaintiff. From that judgment this appeal is prosecuted.

At the outset it is insisted that the Peoples Bank & Trust Company had not the legal capacity to sue. In this connection it is insisted that neither its original nor amended articles of incorporation confer on it the power to act as guardian. The Peoples Bank & Trust Company was first incorporated under the name of the Peoples Bank, with power to do a general commercial banking business. Subsequently its articles of incorporation were amended, and its name changed to the Peoples Bank & Trust Company.

The amended articles further provide:

"The nature of the business carried on and conducted shall be a general banking and trust business, as provided for by chapter 32 of the Kentucky Statutes, 1903, relating to corporations, banks, trust companies, and combined banks and trust companies, or such parts thereof as apply to corporations of their character."

It is argued that the foregoing provision is not a compliance with subsection 3, section 539, chapter 32, Kentucky Statutes, which provides:

"Such persons shall execute articles of incorporation which shall specify: \* \* \*

"(3) The nature of the business or objects or purposes proposed to be transacted, promoted or carried on."

The statute provides for the creation of a corporation for the purpose of conducting both a banking and trust business. Section 612a, Kentucky Statutes. Section 606, Kentucky Statutes, provides:

"Any trust company organized under this article may be appointed and act as guardian of infants, executors, administrator or curator of estates of decedents, committee of persons of unsound mind, receiver or trustee for persons or estates; and may act as agent or attorney for the transaction of any business or the management of estates, the collection of rents, accounts, interest, dividends, notes, bonds, securities for money and debts, and demands of every character; may receive on deposit and for safekeeping, gold, silver, jewelry, money and other personal property of every kind, and shall have a lien upon all personal property deposited with it for its charges."

As chapter 32, Kentucky Statutes, fully sets forth the nature of business that may be carried on by a combined bank and trust company, and the powers which such company may exercise, and as one of these powers is the power to act as guardian, we conclude that the amended articles are sufficiently definite to state the precise "nature of the business, or the objects or purposes proposed to be transacted, promoted or carried on."

The particular tract of land in controversy lies, according to plaintiff's evidence, just west of what is known as the Hurricane Steamboat Landing, while defendants claim that it is included in the deed from Foster Threlkeld to Clara T. Brown, and is a part of the Hurricane Steamboat Landing. The case really turns on the location of the line "thence SE course with the fence so as to include the new house to a line between Guess and Threlkeld." According to plaintiff's evidence there was in existence at the time of the deed a post and rail fence extending from the Ohio River to the line between Guess and Threlkeld, and including the new house. This fence remained there for some time, and was repaired now and then. Joe Brown, Clara Brown's Husband, tore this fence away. For a long time defendants recognized this fence as the dividing line, but after a while the waters of Hurricane Creek and of the Ohio River began to cut away the bank where the Hurricane Steamboat Landing was located, and thereupon defendants moved west on the adjoining land belonging to plaintiff. This land was known as the Tie Yard, and one of the considerations stated in the deed is the right of "ingress and egress over said premises to the Tie yard." The evidence for the defendants is to the effect that Joe Brown was a river man, and that Foster Threlkeld intended to give to his sister the steamboat landing so that they could make a living out of it. The fence referred to in the deed was not the old stationary fence, but was a portable fence which, at the time of the execution of the deed, stood several feet west. The action being at common law, and being submitted without the intervention of a jury, the judgment of the trial court is entitled to the same weight as the verdict of a well-instructed jury, and cannot be reversed unless flagrantly against the evidence. Not only is his finding not flagrantly against the evidence, but, in our opinion, is supported by a preponderance of the evi-

dence. The old stationary fence runs near the house, and if that line be continued it reaches the line between Guess and Threlkeld. If the line be run according to defendant's contention it does not reach the line between Guess and Threlkeld. It is much more probable that the grantor in the deed fixed the west line to run with the stationary fence rather than with the portable fence, which was moved about from place to place as high water required. Furthermore, the conduct of the defendants, who obtained permission from Foster Threlkeld's former guardian to occupy a portion of the Tie Yard, is strongly persuasive of the fact that they recognized the stationary fence, which was a boundary between Hurricane Steamboat Landing and the Tie Yard, as the fence referred to in the deed. Furthermore, the fact that the right of egress and ingress from and to the Tie Yard over the premises conveyed by the deed was one of the considerations for the deed tends to support the conclusion that it was not the purpose of the grantor to convey the Tie Yard, which is now the property in dispute.

But it is argued that it was the grantor's purpose to give his sister a steamboat landing, and that this right is a franchise appurtenant to the farm, and continues, notwithstanding the fact that that portion of the farm described in the deed was worn away by erosion. There might be some merit in this contention if the grantor had deeded his sister a boat landing in general terms. This, however, he did not do. He deeded to her not a general right to land boats, but a particular boat landing, to-wit: The Hurricane Steamboat Landing. Then, to make more certain what was meant by the Hurricane Steamboat Landing, he describes with reasonable particularity the precise land which he intended to convey. In other words, it was a particular landing, appurtenant to the tract of land described in the deed, and not a general steamboat landing appurtenant to any of the grantor's land not included within the deed. Having described the landing and the land to which it was appurtenant, and which was conveyed by the deed, it follows that the destruction of that land by erosion did not give to the grantor any right to use any of the grantor's remaining land for the purpose of landing boats. *Weiss v. Meyer*, 55 Ark., 18.

Judgment affirmed.

**International Harvester Company v. Commonwealth.**

(Decided September 26, 1913).

**Appeal from Hickman Circuit Court.**

1. Judgment—Action to Enforce Collection of—Defense.—In an action to enforce collection of a judgment, an answer by defendant denying that such a judgment as is sought to be enforced exists, is a good defense.
2. Judgment—Pleading—Defense.—An allegation that the judgment sought to be enforced was entered without service of process upon defendant or any officer or agent of defendant, presents a good defense.
3. Pleading—Demurrer.—Upon demurrer the truth of the allegations of the pleading in question are admitted by the demurrer for the purpose of testing its sufficiency.

HUMPHREY, MIDDLETON & HUMPHREY and BRADSHAW & BRADSHAW for appellant.

JAMES GARNETT, Attorney General; R. L. SMITH and J. D. VIA for appellee.

**OPINION OF THE COURT BY JUDGE TURNER—Reversing:**

This is an equitable action by the Commonwealth seeking to enforce the collection of a judgment alleged to have theretofore been recovered by it against appellant for \$1,000.

The defendant answered, and in the first paragraph it was specifically denied that the Commonwealth had ever recovered any such judgment as is set out in the petition.

In the second paragraph it was stated that appellant was a foreign corporation, and that the judgment referred to in the petition as having been recovered by the Commonwealth was not binding upon defendant for the reason that it was not served with any process which would bring it before the court or within the jurisdiction thereof before the entry of said judgment; that although lawful process was issued and delivered to persons authorized to serve the same, the service thereof was only had upon two persons neither of whom was at the time of said service an officer or agent of said defendant, and that at the time of said service the defendant was not doing any business within the county of Hickman or the State of Kentucky.

To this answer a demurrer was sustained, and the defendant declining to plead further, judgment was

entered directing certain garnishee defendants to pay funds into court in satisfaction of the judgment, and from that judgment this appeal is prosecuted.

An agreement is filed in the record wherein it is stipulated that certain affidavits and evidence were read and used by the parties on the hearing of a motion to quash summons by defendant in the proceeding wherein the judgment for \$1,000 was entered, and that the same might be considered upon the hearing of this action; and the affidavits and evidence referred to are copied in the record.

But we are aware of no practice that would permit us to consider this evidence in passing upon the demurrer to the answer or which would authorize us to give an opinion as to its legal effect. In considering a demurrer the truth of the allegations must be presumed; in fact, they are admitted as true by the demurrer for the purpose of testing the sufficiency of the pleading.

If, as alleged in the first paragraph of the answer, the Commonwealth recovered no such judgment as is described in the petition, that paragraph presented a complete defense; if, as alleged in the second paragraph, the judgment entered was without service of process upon appellant, or any officer or agent of appellant, then it was void, and that paragraph presented a complete defense.

If the attorneys for the Commonwealth desire to rely upon the record and proceedings in the former case upon appellant's motion to quash the summons therein, as a bar to its right to again test that question, they should have filed a reply pleading the facts; and they yet may do so upon the return of this case.

The judgment is reversed for further proceedings consistent herewith.

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### **Stratton & Terstegge Company v. Meriwether.**

(Decided September 30, 1913).

Appeal from Jefferson Circuit Court  
(Chancery Branch, First Division).

1. **Streets—Right of Abutting Owner to Obstruct.**—An abutting owner may in the conduct of his business or in the improvement of his property, temporarily obstruct a part of the adjacent street, if the obstruction does not unreasonably interfere with the right of the public to the use of the street.

2. **Streets—Obstruction by Abutter.**—The obstruction of a street by an abutting owner must be temporary in its nature and such as is reasonably necessary for the transaction of business or the enjoyment of the premises, and the obstruction must also be reasonable with reference to the rights of the public. If an obstruction continues for such a period as to amount to an unreasonable interference with the public travel, it is unlawful and a nuisance. The question whether an obstruction is allowable or a nuisance is generally a question of fact to be determined by the facts of each particular case.
3. **Streets—Obstruction—Facts of This Case.**—S. & T. owned large factory buildings on each side of a narrow street on which a railroad track was laid so that cars loaded with freight for use in the factory might be hauled on the street to a point opposite the door of the factory and there unloaded. For the purpose of unloading cars so placed, S. & T. put temporary supports in the street, and on these supports laid planks reaching from the factory door to the car door. These planks so placed completely obstructed the street, and it would be so obstructed from periods of two to eight hours. Held that such an obstruction was unlawful and a nuisance, although the hands unloading the car were instructed to remove the planks and afford free passageway to travelers when so requested.
4. **Judgment—Conclusiveness of.**—A judgment of the lower court which has been affirmed by this court is conclusively binding upon the parties.
5. **Judgment—Construction of.**—Judgments should be reasonably construed and enforced so as to carry out the spirit as well as the letter of the judgment.

GIBSON & CRAWFORD for appellant.

ELMER C. UNDERWOOD for appellee.

#### OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The facts out of which this litigation arose are very fully stated in *Stratton & Terstegge Company v. Meriwether*, 150 Ky., 363. The judgment of the lower court, which was affirmed in the case referred to, provides that Stratton & Terstegge Company "are also hereby enjoined and restrained from in any manner using Crop street so as to interfere at any time with the full and free use of the carriage way of Crop street by the public, both on foot and in vehicles, and are also enjoined and restrained from so using either sidewalk of Crop street as not to admit full and free passage of pedestrians at any and all times on either the one or the other of said sidewalks—that is, at no time shall both



sidewalks be so obstructed at one and the same time; \* \* \* it also appearing to the court that the railroad switch referred to in the pleading and in the evidence was laid under authority from the General Council of the city of Louisville, and it further appearing that the plaintiff does not object to the reasonable use of said switch, it is therefore, ordered that the defendant may continue to make a reasonable use of said switch, but defendant shall not so use said switch as to violate any of the preceeding clauses of this judgment."

After this judgment had been affirmed, the appellee, Meriwether, appeared in the lower court and filed an affidavit setting out that the Stratton & Terstegge Company was continually violating the injunction granted by the lower court "in that Stratton & Terstegge Company from time to time have blockaded the entire carriageway of Crop street and the entire south sidewalk of Crop street by placing a platform or bridge from the freight cars to the buildings of the Stratton & Terstegge Company on the south side of Crop street. \* \* \* That said platform or bridge is constantly used by said Stratton & Terstegge Company in the manner above indicated for loading and unloading said freight cars, and unless compelled to desist from so using the street by this court, said Stratton & Terstegge Company will continue to make said unlawful use of said street."

Upon filing this affidavit, which was accompanied by a photograph showing the manner in which the street was closed to travel by the platform used in carrying goods from freight cars standing in the street to the factory of the Company, Meriwether moved the court to punish the company for contempt in violating the judgment forbidding it to close the street.

In response to the rule issued against it, the company said "It is true that at times, when unloading cars containing material from its factory on the south side of Crop alley, a temporary wooden horse has been placed on the alley south of the railroad tracks in order to allow boards to be placed from the cars to the factory to expedite the unloading or loading of cars placed on the switch; that when said horse and boards are so placed, there has always been some representatives of the defendant attending to the loading or unloading of the car, in charge of said boards, who would immediately remove same whenever any vehicle attempted to pass up or down Crop alley; that when said boards and wooden horse were

temporarily in that position, the sidewalk on the north side of Crop alley was open to pedestrians; that the boards and wooden horse so placed were no greater obstruction to Crop alley than a vehicle would be which any citizen might place alongside of the car for the purpose of loading or unloading same; that said boards were in position for a less space of time at any one time, and blocked the street for a less length of time than would vehicles unloading from said cars standing in Crop alley; that immediately upon said cars being loaded or unloaded, as the case might be, said wooden horse and said boards were immediately removed and the south side of Crop alley left entirely unobstructed."

Upon hearing the case the court adjudged the response insufficient and imposed a nominal fine upon the company for its contempt in failing to obey the injunction, which required it to conform to the terms of the judgment, and in the course of the judgment imposing a fine the court said: "It is further ordered by the court that the defendant shall not use or obstruct the street with the platform mentioned in plaintiff's motion." Of this judgment the company complains.

The evidence shows that when freight cars were placed on the track in Crop street for the purpose of being loaded or unloaded at the factory of the company abutting on the street, a wooden platform resting on supports would be extended from the door of the car to the door of the factory, on which platform the goods were moved to and from the car and the factory. It is also shown that when this platform was being used the street was completely closed to travel by vehicles, and one of the officers of the company during his examination said, "Q. About how long on an average does it require to unload a car A. That depends on the material in the car. Q. Give us your best judgment as to what this average time is to unload one of those cars. A. On an average it would take me from two to six hours; sometimes eight hours; sometimes I can spend ten hours. Q. Unless some one would ask you to remove the obstruction you would allow it to remain during the entire process of loading or unloading, would you not? A. Yes, sir; but as soon as a car is unloaded we remove the boards."

This witness also testified that if any persons came along while the street was obstructed by the platform and wanted to get by, the men unloading or loading the

car, as the case might be, would at once remove the platform so as to allow passageway, and that to do this only took a minute or so, but that so far as he knew no request had been made to have the platform removed while a car was being loaded or unloaded for the purpose of permitting a traveler to pass through the street.

On this appeal the judgment of the chancellor, which was affirmed in the case referred to, is conclusively binding on the parties, although that judgment might, as suggested by counsel for appellant, impose such limitations upon the use of the street by appellant as to seriously interfere with its business.

In the judgment referred to the appellant was "enjoined and restrained from in any manner using Crop street so as to interfere at any time with the full and free use of the carriageway of Crop street by the public, both on foot and in vehicles," and was also enjoined and restrained from obstructing both sidewalks at the same time. The admitted facts in this record establish beyond question that the appellant disobeyed and violated the clause forbidding the obstruction at any time of the use of the carriageway, as it is idle to say that to frequently obstruct the full width of the carriageway of a street from two to eight hours at a time by heavy timbers loaded with heavy irons, is not more than a mere temporary obstruction. We do not of course understand the judgment to mean that placing occasionally for a few minutes a temporary obstruction in the street that might interfere with its use is unauthorized or that it would subject the appellant to punishment for violating the injunction. The judgment should be given a practical and reasonable interpretation and such a one as would carry out its purpose and intent. For example, no one would maintain that if in loading or unloading a wagon, or in turning a wagon around for the purpose of being loaded or unloaded, the street should be obstructed for a few minutes that this would violate the meaning of the judgment. But when the street is obstructed for hours at a time, this obstruction does constitute a palpable violation of the letter as well as the spirit of the judgment and really amounts to a confiscation or appropriation of this street by appellant for its own use and benefit to the exclusion of the rights of the public.

The judgment, when fairly and practically applied to existing conditions, is, we think, in harmony with the

general principles of law that control in cases like this, and so if we should adjudge the case independent of the judgment and according to these well understood principles, we would rule that the use being made of the street by appellant amounted to an unauthorized and unlawful obstruction of it. In Dillon on Municipal Corporations, 5th Edition, sections 1168 and 1169, the general rule applicable in cases like this is thus stated:

"We have shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvements of adjoining lots by digging cellars, by building, etc.; this may occasion a reasonable necessity for using a part of the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no absolute necessity; it suffices that the necessity is a reasonable one. \* \* \*

"The temporary obstruction of public travel for the purpose of loading and unloading vehicles in front of business premises is recognized as a necessary exception to the general rule that any obstruction of a street or encroachment thereon which interferes with public travel and transportation is a public nuisance. The owner or occupant of abutting premises is justified in making a reasonable use of the street for the purpose of conveying goods to or from his premises, and for this purpose he may place temporary erections or obstacles such as skids across the sidewalk. But the right of the abutter to use the street for these purposes is subject to necessary limitations and restrictions. The obstruction must be temporary in its nature and such as is

reasonably necessary for the transaction of business or the enjoyment of the premises. Mere necessity in the business of the abutter is not sufficient of itself to justify the obstruction. The obstruction must also be reasonable with reference to the rights of the public whose interests in the street may not be sacrificed or disregarded. The right to so obstruct the street or sidewalk must also be exercised with a due regard to the rights and safety of pedestrians and others lawfully using the streets. If the obstruction continues for such a period as to amount to an unreasonable interference with the public travel, it is unlawful and a nuisance. The question whether an obstruction in a street is necessary and reasonable is generally a question of fact to be determined by the court or jury from the evidence relating thereto."

Under the rule thus announced, it is, we think, manifest that the use being made of this street by appellant was not temporary. It really amounted to a permanent obstruction, as no one would care to go through this street when he saw the whole of it obstructed by freight cars and a big platform loaded with heavy irons, although it may be true that appellant's employees would if requested remove the platform so as to admit passage. But the public who have the right to use a street are not required every time they want to use it to ask the permission of some abutting owner who has taken possession of it or to wait until he can take out of the way obstructions that completely blockade it. The temporary obstruction that the merchant and the business man and the abutting property owner may place in a street to enable them to receive and deliver goods and material is very different from the character of obstruction placed in this street by appellant.

There is also of course a marked distinction between the partial and the total occupation of a street by a merchant or business man or abutting owner. It might be permissible for this class of persons to use a part of the street for more than a mere temporary purpose if a sufficient part of the street was left open for public use. In other words, a person having the right to use a part of the street in the conduct of his business, as in delivering or receiving goods or material, might so use a part of it in such a manner as to amount to more than a temporary obstruction of it without infringing on the rights of the public, if a sufficient space was left open

to enable the public to use the street. But under no circumstances that we can conceive of has a business man or abutting owner the right to make such use of the whole street as will in effect permanently deprive the public of its use, if indeed it would be legitimate to purposely obstruct the whole of it for any appreciable length of time. In *Callanan v. Gilman*, 107 N. Y., 360, 1 Am. St. Rep., 831, a case much like this, the court said:

"The primary purpose of streets is the use by the public for travel and transportation, and the general rule is, that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto. \* \* \*

"Now, what are the facts of this case? Both the plaintiffs and the defendant were extensive retail and wholesale grocers, having stores near to each other on the south side of Vesey street in the city of New York; and a large portion of the plaintiff's customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk, and then a bridge, made of two skids planked over so as to make a plankway three feet wide and fifteen feet long, with side pieces three and one-half inches high, was placed over the sidewalk with one end resting upon the stoop of the

defendant's store and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the inner end about twelve inches, and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed over this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position, when not in use, for ten or fifteen minutes, and that it sometimes remained in position when in use one hour, one hour and a half, and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of nine o'clock a. m. and five p. m., and that it obstructed the sidewalk the greater part of every business day.

"Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation, by the defendant, of the sidewalk in front of his store to his private use, in disregard of the public convenience. Even if, in some sense, such use was necessary to the convenient and profitable transaction of his business, and if the obstruction of the sidewalk was no more, and even less, than it would be by any other method of doing the business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing, and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place, or enlarge his premises so as to accommodate it. It was incumbent upon the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck; and this he could do at intervals during the day, at no time obstructing the street for any considerable length of time. But there is no authority, and no rule of law, which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was, therefore, guilty of a public nuisance."

Another similar case is *John A. Tolman & Company v. City of Chicago*, 240 Ill., 268, 24 L. R. A. (n. s.), 16 Ann. Cases, 142, in which the same general principles were announced as may be found in *Dillon* and in the *Callanan* case, although the court on the facts found that the temporary use of the street by the Tolman Company in the manner stated in the opinion was not unlawful. It is said in these cases, and the truth of it is obvious, that the rights of the parties in all cases like this must be ascertained and judged by the facts of each particular case. There is no disagreement in the authorities as to the principle of law applicable. The difference arises when it is undertaken to apply these principles to the facts. We have not, however, been referred to any case, nor have we been able to find one that would justify the appeal in the occupation of the street in question in the manner stated. To hold such use of a street lawful would be to ignore altogether the rights of the public and turn the street over to abutting owners for such use and occupation as the convenience of their business might seem to demand.

Upon the facts before us we have no doubt of the correctness of the judgment appealed from, and it is affirmed.

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### **Jones, et al. v. Lickliter.**

(Decided September 30, 1913).

#### **Appeal from Laurel Circuit Court.**

1. **Vendor and Purchaser—Effect of Judicial Sale to Pay Purchase Price.**—When land is sold to pay the purchase price, the effect of the sale is to divest the purchaser of any interest in the land, and if he remains in possession after the sale, his possession is no longer hostile to the possession of the purchaser at the judicial sale.
2. **Ejectment—Title From Common Source.**—When both parties to an ejectment suit claim title under a common source, it is not necessary for the plaintiff to trace his title farther back than the source from and under which both claim.
3. **Executors and Administrators—Purchase of Land at Judicial Sale (by Administrator)—Title.**—When land is purchased at a judicial sale by an administrator, the purchase will have the effect of vesting in him title to the land as trustee for the benefit of the heirs of his intestate.

**SAM C. HARDIN and WILLIAMS & JOHNSON for appellants.**

**HAZELWOOD & JOHNSON for appellee.**



## OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The appellee, claiming to be the owner and in possession of a tract of land described in his petition, brought this suit in equity against the appellants, John R. Jones, et al., to restrain them from trespassing on the land and removing timber and material therefrom.

The appellants, after traversing the petition, set up that they were the owners of the land by adverse possession. The appellants did not introduce any evidence, and when the case was submitted, upon the evidence of appellee, a temporary injunction previously granted was perpetuated and the appellants perpetually enjoined from trespassing on or otherwise interfering with appellee.

On this appeal it is the contention of counsel for appellants that it was necessary to entitle appellee to judgment that he should show a legal title deducible from the Commonwealth, and that his failure to do this entitled appellants to a judgment; and further insisted that the evidence shows that the legal title to and the possession of the land is in appellants and not appellee. For the appellee the argument is made that even if appellee did not exhibit a good paper title to the land, that his actual possession of the premises authorized him to maintain an action for trespass on his possession, and likewise an action to enjoin such trespass.

The evidence shows that some time prior to 1883 one Jarvis Jackson sold and conveyed the land in dispute to the appellant, John R. Jones, who took possession under the sale and received a deed, which was never put to record; that he executed a note for the deferred payment, and after the death of Jarvis Jackson suit was brought on this note to subject the land to its payment. This suit progressed to a judgment and the land was ordered to be sold to pay the debt, and was sold, and at the sale the whole of the land was bought by the administrator of Jarvis Jackson for the amount of the debt. This sale was confirmed, but it seems that no deed was made by the court and thus the matter stood for many years.

It is further shown by the evidence that Jarvis Jackson left surviving him one child, J. C. Jackson. The evidence upon the point that J. C. Jackson was the only heir and child of Jarvis Jackson is not as clear or direct as it should be, but we think the reasonable and fair

inference from the record is that J. C. Jackson was the only heir and child of Jarvis Jackson.

It further appears that J. C. Jackson died, leaving surviving him only two children, and these two children conveyed in 1911 the land in controversy to Lickliter. It is further shown that while Jones, under his purchase from Jarvis Jackson, took possession of the land and held it for a time, that for twenty years at least no one had been either in the actual or constructive possession of it. It was not for many years enclosed by any fence, nor has there been any habitable or occupied house on it. It also appears that Jones, if he ever claimed the possession, abandoned such claim, because he made several attempts to buy the land from the children of J. C. Jackson.

When the land was sold to satisfy the unpaid purchase money due by Jones, and purchased by the administrator of Jarvis Jackson, this sale and purchase had the effect of vesting the title in the administrator as trustee for the benefit of the heirs of Jarvis Jackson, and the further effect of divesting Jones of any title he may have had to the land, and if he continued in possession of the land after that time his possession was not hostile to the possession of the purchaser at the judicial sale. *Cryer v. McGuire*, 148 Ky., 100. So that under the circumstances Jones has no title or claim to the land resting on possession that is available to him in this controversy.

In respect to the argument that it was incumbent upon Lickliter, before he could maintain the action, to show a title deducible from the Commonwealth when his title was put in issue, as it was by the answer of Jones, it is a sufficient answer that any title that Jones relies on begins with the conveyance of the land to him by Jarvis Jackson, and as Lickliter, as well as Jones, claim title from and under this common source, it was not necessary that Lickliter should go back to the title of Jarvis Jackson in an effort to show that he had a good paper title to the land. *Luen v. Wilson*, 85 Ky., 503; *Gaulbaugh v. Rouse*, 31 Ky. L. R., 1195. Under the facts shown by the record, when this action was brought Lickliter had not only the possession of the land, but a title to it that Jones was not in a position to dispute, and, therefore, the court properly adjudged Lickliter the relief he sought.

The judgment is affirmed.

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**BRIEFS—**See Appeal.

**BUILDING—**See Contracts, 9.

**BURDEN OF PROOF—**See Wills.

**BYSTANDERS—**See Jury.

**CANCELLATION—**See Deeds, 3; Insurance, Life.

**CARNAL KNOWLEDGE—**See Criminal Law, 21-22.

**CARRIERS—**Intoxicating Liquors; Railroads—

1. Livestock—Insufficient Facilities for Loading—Liability—Instruction.—In an action for damages for injury to livestock alleged to have resulted from the failure on the part of the carrier to furnish reasonably safe facilities for loading, an instruction telling the jury that if they believe from the evidence that the plaintiff or his agent ordered and directed the defendant to place one of its cars at the freight house instead of at the company's regular place for loading the livestock, and then and there agreed with the defendant to take charge

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- of the loading at the freight house, plaintiff thereby adopted the means at hand at the freight house for loading the stock, and the only duty which the law imposed upon the defendant was to exercise ordinary care in so placing its car at the freight house platform as to afford the plaintiff an opportunity to load the stock into the car with reasonable safety, is erroneous because imposing upon the carrier the obligation to exercise ordinary care to place the car at the freight house platform so as to afford the plaintiff an opportunity to load his stock with reasonable safety, even though the facilities for loading were such that in the exercise of ordinary care this could have been done. *Illinois Central Railroad Company v. Edelen* .. 78
2. Livestock—Insufficient Facilities for Loading—Liability—Instruction.—Where the shipper designates the carrier's freight house as the place for loading instead of the carrier's regular place for the loading of livestock, and agrees with the carrier to take charge of the loading at the freight house, the carrier is not liable for a failure to furnish reasonably safe facilities for loading, unless the facilities for loading at the freight house were such that, in the exercise of ordinary care, the car could have been placed so as to enable the shipper to load the stock with reasonable safety, and the carrier failed to use such care, and by reason thereof the stock was injured. *Id.* .. 78
3. Shipment of Livestock—Injury to Stock—Action for—Measure of Damages.—Ordinarily the measure of damages where stock is injured in shipment is the difference between their market value just before and after the injury. This rule, however, contemplates that the injured stock shall be delivered to the plaintiff. *Cincinnati, New Orleans & Texas Pacific Railway Company v. Rankin*..... 549
4. Passengers.—One riding on a train with the knowledge and consent of the conductor is a passenger. *Chicago, St. Louis & New Orleans Railroad Company, et al. v. Benedict's Administrator.* .. 675
5. Demurrage Charges—Right of Consignee to Set-off Claim for Damages.—In an action by a common carrier to recover demurrage charges, the consignee pleaded and proved in defense of the action that the demurrage charges resulted from a failure of the carrier to deliver to it cars, which, if delivered would have prevented the creation of demurrage fees, and this defense was held valid. *Louisville & Nashville Railroad Company v. A. Waller & Company*..... 811
6. Demurrage Charges—Right of Consignee to Set-off—Damages.—In this case the claim for demurrage charges asserted by the carrier was based on rules and regulations adopted by the railroad companies of this State many years ago, no State or Federal statute or regulation made in pursuance thereof being

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relied on, and so the question whether the consignee would have the right to off-set demurrage charges by a claim for damages if the demurrage charges arose and were asserted under a Federal statute or regulation made in pursuance thereto, or by virtue of the fact that they appeared in its public tariff rate, is not decided, *Id.*..... 811

CIRCUMSTANTIAL EVIDENCE—See Homicide.

CITIES—See Municipal Corporations.

COMMERCIAL PAPER—See Banks; Bills and Notes.

## COMMISSION FORM OF GOVERNMENT ACT—

1. Continuation of Employment of Persons Holding Under Former Government—Resolution—Construction of Act.—Following the election of November, 1912, when the City of Lexington voted to adopt the Commission form of Government, on January 6, 1913 at their first meeting, the Board of Commissioners resolved to continue in employment all persons who held under the former government and at the same salary. To an action by certain taxpayers of the city attacking the validity of the resolution and seeking to restrain the payment of such salaries, the lower court sustained a demurrer and refused to issue any restraining order. Held, it must be presumed that all officers and servants of the city under the former administration were duly appointed, and were acting and receiving compensation by virtue of ordinances regularly enacted by rightful authority. There is nothing inconsistent with the Act of 1910, if they shall continue to serve the city until their term of service expires, unless the Act ipso facto discharges them, and there is nothing in the act that can be so construed unless it is section 4, and it clearly refers to elective officers, and affects only the office. Its purpose was to change the tenure of the office, and not the term of the officer. *Jones, et al. v. Cassidy, Mayor, et al.*..... 748
2. Resolution by Commissioners Providing for Continuance of Employees.—The resolution was merely a declaration or affirmation of the effect of the old ordinance still in force, and was unnecessary, for under the old ordinances and resolutions the former servants continue in the employ of the city, and at the same salary, as agents, not officers, until the laws and ordinances affecting their employment or appointment theretofore in force are altered or repealed by the Commissioners. *Id.* ..... 748

**COMMON LAW**—See Action, 4; Repeal of by Statute— Page

**Indictment—Multifariousness.**—An indictment accusing the defendant of making and maintaining a common public nuisance by permitting refuse from a distillery to flow into a stream thereby polluting it, is not multifarious, and is valid under the common law, notwithstanding section 1253 of the Kentucky Statutes prescribes a statutory penalty for a similar offense. *Commonwealth v. Kentucky Distilleries & Warehouse Company, et al.* ..... 787

**COMPROMISE**—See Insurance, Life, 8.

**CONDEMNATION**—See Land, 13-14.

**CONFEDERATE PENSIONS**—See Pensions.

**CONFESSION**—See Criminal Law, 1.

**CONSIDERATION**—See Insurance, Life; Contracts.

**CONSPIRACY**—See Homicide; Indictment, 2.

**CONSTITUTIONAL LAW**—See Elections; Writs—

**Experiment Station of State University—Act Providing For.**—The act of March 11, 1912, is not invalid under section 51 of the Constitution on the ground that it amends the act approved March 21, 1910, without publishing it at length, the act of 1912, simply enlarging the powers of the experiment station. *Bosworth, Auditor v. State University, et al.* ..... 370

**CONSTRUCTION**—See Contracts; Deeds; Wills; Limitation of Actions; Banks; Statutes.

**CONTEMPORANEOUS CONSTRUCTION**—See Statutes.

**CONTEST**—See Elections.

**CONTINUANCE**—See Criminal Law; Trial; Homicide, 15; New Trial.

**CONTRACTS**—See Insurance, Life; Municipal Corporations; Fraud; Husband and Wife; School Board; Animals; Damages; Fiscal Courts; Specific Performance; Vendor and Purchaser—

1. **Construction of.**—A contract obligating the signers to "guarantee an overdraft to the First National Bank to the extent of \$4,500; all the receipts of the White City Co., to be deposited in the bank until the above is extinguished," was not

## CONTRACTS—Continued—

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- a continuing guaranty but a guaranty of an existing overdraft. First National Bank of Louisville v. Bickel, et al..... 8
2. Extrinsic Evidence to Show Meaning of.—Where a written contract is not open to two or more constructions, the rights and liabilities of the parties under it are to be determined by the paper alone, and its meaning cannot be extended or modified by extrinsic evidence. *Id.*..... 8
3. Ambiguity—Meaning That Should Be Given by Chancellor.—Where the parties to a contract ambiguous in its terms, have put their own interpretation upon it by their action under it, a chancellor will not go into technical rules of construction in determining its meaning, but will give it that meaning which the parties themselves have put upon it. *Asher v. Simpson* .. . 183
4. Action for Value of Work Done Under Contract for Purchasing Tobacco—Question of Fact—Evidence.—In an action to recover for services rendered under a contract for purchasing and putting up tobacco the questions were of fact; they were fairly submitted to the jury, and the finding in favor of the plaintiffs will not be disturbed. *Conn & Company v. Hammonds & Ogles* ..... 215
5. Avoidance for Fraud—Settlement Between Injured Servant and Master—When May Be Avoided.—A servant who settles a claim against the master growing out of personal injuries may avoid the settlement if he can show that fraud was practiced in its procurement or that he did not have sufficient mental capacity to understand the nature or effect of the contract. *Louisville & Nashville Railroad Company v. Lee*..... 226
6. Measure of Damages—Instruction—Failure to Give.—Error.—In an action for damages for breach of a contract, an instruction that gives the jury no guide by which to determine the amount of damages is erroneous. *Stearns Lumber Company v. Inman* .. . 251
7. Measure of Damages.—Where plaintiff contracted with the defendant to cut and haul timber at certain agreed prices, and the defendant refused to permit plaintiff to carry out his contract, the measure of damages is the difference between the contract price and what it would have cost plaintiff to complete the work according to the contract. *Id.*..... 251
8. Personal Services—Other Employment.—A contract to cut and haul timber at certain agreed prices is not a contract for personal services and the failure of the plaintiff, upon the breach thereof by defendant, to use due diligence to secure other employment in no way affects his right to recover. *Id.*..... 251
9. Building—Plans and Specifications—Decision of Architect and Construction Board—Effect.—Where the specifications for a public building provide that "if any discrepancy appears in the plans and specifications, the same must be referred to the architect. All differences or discrepancies as to sizes



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- and quality of materials and workmanship, the decision of the architect and the Court House Construction Board is to be final and binding on the contractor," the decision of the architect and the Court House Construction Board that certain marble and tile work furnished by a sub-contractor who agreed to do the work in accordance with the plans and specifications, were included within the specifications, and should not be allowed as extras, is binding on both the contractor and the sub-contractor in the absence of a showing of fraud or mistake. *Caldwell & Drake v. Pierce*..... 328
10. Construction of.—When the court comes to construe a writing, it will not be altogether controlled by the name that the parties have given it, but will look to the paper and determine for itself the nature and quality of the writing. If it is in fact a mortgage, although it may be called a deed, or is in truth a contract of sale and purchase, but designated a mortgage, the court, while giving due consideration to the acts of the parties in describing the paper, will not permit injustice or fraud to be practiced by following the title given to the paper by the parties, but will so construe it as to carry out what the facts show was their real intention in its execution. *Hurst, Jr. v. Winchester Bank, et al.*..... 358
11. Action for Breach of—Instructions.—The contention of appellant that a peremptory instruction should have been given because appellee had not shown that he had applied to the manager and principal agent for employment cannot be sustained because the evidence shows there are sub-managers over the different departments of appellant's large business, and that appellee did apply several times to the manager of the department in which he had worked. *Mengel Box Company v. Hall* ..... 384
12. Right of City to Tax Bridge Company—Sale of Bridge Company Property—Franchise Tax.—Under a contract between a bridge company and a city by which it was agreed that the city reserved the right to tax the bridge and its appurtenances, the city has a vested right to collect a tax on the bridge and its appurtenances, but no vested right to collect a franchise tax from the bridge company; and the sale by the bridge company of its property to another is valid, although by means of the sale, the city is disabled from collecting a franchise tax from the bridge company as it had formerly done. *Louisville & Nashville Railroad Company, Henderson Bridge Company, Central Trust Company of New York v. City of Henderson* .. .. 575
13. Animals—Keep.—In an action to recover on a contract for the keep of stock, where defendant claimed that the stock was to be kept on shares, evidence examined and held to sustain the finding of the chancellor in favor of plaintiff. *Von Cotzhausen v. Barker* ..... 624

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14. Between Two Railroads As To Use of Railroad—Apportionment of Taxes and Franchise Taxes.—Under a contract between two railroad companies by which one granted to the other the right to use a part of its railroad, the grantee agreeing to pay its proportion of the taxes on that part of the railroad according to the number of engines and cars which each run over it, the grantee having no use for the grantor's engines and cars, the grantee is not responsible for the tax on the grantor's engines and cars or for the franchise tax of the grantor, the franchise tax being a tax on the intangible property of the grantor. *Chesapeake & Ohio Railway Company v. Louisville & Nashville Railroad Company*. . . . . 637
15. Damages—Pleading.—Where plaintiff leased a coal mine from a company of which defendant was president, and defendant agreed with plaintiff to make his pay rolls at the end of each week, and plaintiff seeks damages for a breach of the contract by defendant, a petition which sets forth the terms of the agreement, the consideration, the violation of the agreement by defendant, the fact that plaintiff could and would have mined the coal at a profit, and that he was damaged by defendant's breach of the contract in the sum of \$1,260, is sufficient. *Pugh v. Jackson, Jr.* . . . . . 649
16. Validity.—Where plaintiff leases a mine from a company of which defendant is president, and agrees with plaintiff to make his weekly pay rolls until all the coal is mined, the contract is not void for indefiniteness. *Id.* . . . . . 649
17. Consideration.—Where plaintiff has leased a mine from a company of which defendant is president, and the defendant is to make plaintiff's weekly pay rolls in consideration of a commission of 5 cents per ton for selling the coal, the consideration is sufficient to support the contract. *Id.* . . . . . 649
18. Evidence—Peremptory Instruction.—Where plaintiff leases a coal mine from the company of which defendant is president, and defendant in consideration of a commission of five cents per ton for selling the coal, agrees to make the weekly pay rolls for plaintiff, defendant is not entitled to a peremptory instruction on the ground that for the first two weeks the mine was operated the pay rolls exceeded the output of the mine, in view of the evidence to the effect that the mine had to be cleaned up and put in proper condition, and it cannot be said as a matter of law that defendant gave plaintiff a reasonable opportunity to determine whether or not the coal could have been mined at a profit. *Id.* . . . . . 649
19. Breach—Damages—Instruction.—In an action for damages for breach of a contract, instructions examined and held properly to present the law of the case. *Id.* . . . . . 649
20. Damages—Measure.—Where plaintiff leases a mine from a company of which defendant is president, and defendant, in consideration of a commission of five cents per ton for selling

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the coal, agrees to make the pay rolls for plaintiff, damages by way of profit for a breach of the contract by defendant are within the reasonable contemplation of the parties, and may be recovered if not too remote or speculative to be capable of legal ascertainment. Id.....

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21. Damages.—Where plaintiff leases from a company, of which defendant is president, a coal mine, and defendant agrees, in consideration of a commission of five cents per ton for selling the coal, to make the weekly pay rolls for plaintiff, evidence in an action for breach of the contract examined and held sufficient to show that plaintiff could and would have mined the coal at a profit, and to sustain a verdict in his favor. Id..... 649
22. Action for Breach of—Measure of Damages.—In an action for a breach of contract by the company to pay 9 cents a ton for all coal in a certain entry, the plaintiff to keep the entry in good condition, a verdict for \$1,518 cannot be sustained in the absence of proof showing definitely the amount of coal to be gotten out, and the reasonable cost to the plaintiff of doing the things he was to do under the contract; as the measure of damages in such an action is what the plaintiff would have received under the contract less the reasonable cost of doing the work. *Trosper Coal Company v. Rader*..... 670
23. Action for Breach of—Evidence.—Where the plaintiff sent an agent to another to obtain a contract from him for the plaintiff and his agent jointly, what took place between the agent and the person to whom he was sent, is competent evidence against the plaintiff, and the defendant may also show that this was reported by the agent to the plaintiff and what he said when it was reported to him. Id..... 670
24. Action for Breach of.—Where the defendant refused to allow the plaintiff to complete his contract, the defendant may not show what it paid others to carry out the contract without first showing that the prices so paid were reasonable. Id..... 670

CONTRIBUTORY NEGLIGENCE—See Master and Servant; School Board; Instructions, 3-6.

CONSTRUCTION—See Constitutional Law; Contracts; Statutes; Wills.

CONVICTION—See Judgment.

CORPORATIONS—See Parties—

1. Subscriptions for Stock—Right of Subscriber to Rescind for Fraud.—Representations made by an agent of a corporation to induce a person to subscribe for stock where they consist merely of expressions of opinion as to the future prospects of the company and the future value of the stock, are not

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- sufficient to authorize a cancellation of subscription for fraud, although the future condition of the corporation does not fulfill the promises of the agent. *Southern Insurance Company, et al. v. Milligan*. . . . . 216
2. Subscriptions for Stock—Right to Cancel for False Representations Contained in Papers Issued by Corporation.—Where a corporation issues public statements concerning its assets and liabilities and on the faith of these statements a person who is induced to subscribe for stock, may obtain a cancellation of his contract if it turns out that the representations contained in the paper were false or misleading in material respects. *Id.* . . . . . 217
3. Subscriptions for Stock—False Statements as to Surplus.—A statement on a subscription paper that the corporation has a surplus fund in a designated amount, if false, is sufficient to justify a rescission of the contract. *Id.* . . . . . 217
4. Bound by Representations Made by Agent in Obtaining Subscriptions for Stock—Right of Purchaser to Rescind if Representations False.—An agent of a corporation who solicits subscriptions for stock, speaks for the corporation, and it is bound by all the representations that he makes concerning the stock he has for sale, and if his representations are false in material respects, the purchaser may have a cancellation of his contract. *Id.* . . . . . 217
5. Subscriptions for Stock—Right of Purchaser to Cancellation of Contract.—The false representations that will authorize a cancellation of stock subscriptions must be in reference to past or present conditions and not be mere expressions of opinion as to what the future prospects of the corporation are. *Id.* . . . . . 217
6. Subscriptions for Stock—Knowledge of Purchaser That Representations of Agent Are Not True—Right to Rely on Representations.—A person desiring to subscribe for stock, and who is ignorant of the condition of the corporation, may rely on material and reasonable representations made to him by the agent and is not obliged to seek information from other sources or make any effort to verify the truth of the representations made by the agent, but a party who is in possession of information that the representations made by the agent are not true, or who has been put on notice as to their falsity, will not be heard to say that he was induced by the false representations to subscribe for the stock. *Id.* . . . . . 217
7. Subscriptions for Stock—False Representation of Agent as to Other Purchasers and Dividends That Will Be Paid.—Where a party has been induced to purchase stock upon false representations made by the agent of the corporation that influential and well known citizens had purchased stock, or that the corporation is paying dividends, may have a cancellation of the contract. *Id.* . . . . . 217

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8. Action of State Institution Which is a Corporation—Employment of Counsel.—The action of a State institution which is a corporation authorized to sue and be sued, will not be dismissed because the attorney bringing the action has not been employed as provided in Subsection 5 of Section 112 Ky. Statutes. *Bosworth, Auditor v. State University, et al.*..... 370
9. Actions—Venue—Process.—An action against a corporation for breach of contract may be brought in the county where the contract was made or to be performed; and summons thereon may be sent to the county of the home office of the company and there served. *Owensboro Shovel & Tool Company v. Moore* ..... 431
10. Suit by Stockholder for Himself and Other Stockholders to Correct Management of—When May Be Prosecuted.—Ordinarily a stockholder may not sue upon behalf of himself and other stockholders to correct an evil in the management of a corporation until the managing board has been requested to take such action, and has refused; but where the managers or directors of the corporation bear such a relation to the matter as to show that they would not from the very nature of things listen to any request to institute an action to remedy it, a stockholder on behalf of himself and other stockholders, who are similarly situated, may proceed to prosecute the suit without making any such demand upon the managing authorities of the corporation. *Lebus, et al. v. Stansifer, et al.*..... 444
11. Suit by Stockholder for Himself and Other Stockholders to Correct Management—When May be Permitted to Sue for Themselves and Others—Pleading.—Where a district board of a burley tobacco society was not conducting the affairs of the corporation in such manner as to satisfy numerous of its stockholders in the matter of carrying out the terms of a pooling contract, in an action by two of the stockholders of the society for relief from the alleged mismanagement, the allegation being that there are something like 40,000 poolers, who in all respects are similarly situated as appellants, it was not improper for the plaintiffs to be permitted to sue not only for themselves, but for all the poolers. *Id.*..... 444
12. Section 551, Kentucky Statutes—Intent to Prevent Incorporators from Getting Control Contrary to Wishes of Majority of Stockholders.—In enacting section 551 of the Kentucky Statutes, the Legislature had in view the idea of preventing the incorporators from getting initial control of corporations at the inception of their organization contrary to the wishes of a majority of the stockholders. Under the provisions of this section, it is not within the power of the incorporators to designate in the articles of incorporation an initial board of directors without any action upon the part of the stockholders. *Id.* .. 444

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13. Placing of Stockholder's Shares in Voting Trust Without His Consent—Right of One to Control His Own Property.—It is well grounded in our fundamental law that there is no limitation upon one's right to control that which is his own, except such restrictions as might be imposed by law, and it would be such a limitation to hold that a stockholder's shares may without his consent be placed in a voting trust either by a charter provision or otherwise, and be deprived completely of their control even upon the ground that it was for his own as well as for the general good. Id. .... 445

COTENANCY—See Adverse Possession.

COUNSEL—See Trial.

COUNTIES—CLAIM AGAINST—See Appeal, 19; County Board of Health; County Health Officer.

## COUNTY BOARD OF HEALTH—

Discretion of.—The power to determine what physicians, nurses, guards and attendants are necessary to carry out the rules and regulations provided by law and by the State Board of Health, is left to the discretion of the County Board of Health; the power to fix the compensation of the person so employed is vested in the fiscal court of the county. Breckinridge County v. McDonald, et al. .... 721

## COUNTY HEALTH OFFICER—

1. Board of Health.—The County Health Officer is the executive officer of the County Board of Health; he acts for it to execute its lawful demands in such matters; his duty is that of oversight and direction more than personal execution. Breckinridge County v. McDonald, et al. .... 721
2. Board of Health.—Under section 2055 of the Kentucky Statutes, it is the duty of the County Health Officer to see that the rules and regulations provided for by law, and the rules and regulations of the State Board of Health, are enforced. Id. 721

COURTS—WRITS COURT OF APPEALS MAY ISSUE—See Writs.

COVERTURE—See Limitation of Actions.

CRIMINAL LAW—See Appeal, 23; Evidence, 1; Homicide; False Swearing; Indictment; Larceny; Bawdy House—

1. Confession.—Where, in a prosecution for rape, the prosecuting witness said that the accused came into her room, and a witness testified that he heard the accused say that he went into the room for the purpose of getting his grandmother's

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- money, this was not a confession of guilt, and did not authorize a conviction under section 240 of the Criminal Code. *Black v. Commonwealth* ..... 144
2. Unlawfully Detaining a Woman Against Her Will—Instruction.—Where the evidence for the Commonwealth showed that the accused entered the room of the prosecuting witness and laid his hands upon her and took hold of her against her will and consent, it was not improper, after telling the jury that if the accused unlawfully and willfully took and detained the prosecuting witness against her will and consent with the intent to have carnal knowledge of her, they should find him guilty to instruct the jury that if the accused laid his hands upon or took hold of the prosecuting witness, against her will and consent, and with the intent to have carnal knowledge of her, this would be a taking and detaining in the meaning of the instruction, although it is not essential that this definition of unlawful detaining should be given. *Id.* ..... 144
  3. Misconduct of Juror—How Made Available on Motion for New Trial.—When a new trial is asked on the ground that a juror has been guilty of misconduct, the party seeking a new trial on this ground should do so at the earliest moment after he has received information of the misconduct complained of, and should file his affidavit stating when he received this information. If the party seeking a new trial on this ground fails to do this, he will be deemed to have waived his right to a new trial on this ground after there has been a verdict against him. *Id.* ..... 144
  4. Weight of Evidence for the Jury.—In Criminal cases we will not interfere with the finding of the jury on the ground that the verdict is not sustained by sufficient evidence, unless it affirmatively appears that the verdict is so contrary to the evidence as to make it appear that it was the result of passion or prejudice. *Id.* ..... 144
  5. Form of Judgment Where Accused is Under Twenty-one.—Where a minor defendant is convicted of a felony, the court should in its judgment direct his confinement in the house of reform until he attains his majority, and if his term of punishment be not then ended, that he be transferred to the penitentiary. *Id.* ..... 144
  6. Successive Offenses—Penalty.—A statute imposing a severer punishment for second or subsequent offenses relates only to the penalty and is not a punishment for former offenses. *McIntyre v. Commonwealth* ..... 149
  7. Elements of Crime—Penalty.—The punishment inflicted on a person for a crime or offense constitutes no element or ingredient of such crime or offense. *Id.* ..... 150
  8. Former Jeopardy—Plea—Elements of.—For a plea of former jeopardy to avail, it must appear that in each prosecution, the accused, the sovereignty whose law has been violated, and

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- the offenses not only as to the act but also as to the crime, are identical. *Id.* .. 150
9. Former Jeopardy—Successive Offenses.—In the prosecution for an offense where the accused is also charged with being an habitual criminal, a plea of former jeopardy by the accused alleging that he had theretofore been indicted and tried for another and distinct offense coupled with the same charges of former convictions for felony, was properly held insufficient on demurrer, such plea relating solely to the penalty which constitutes no element of the offense with which he was charged. *Id.*..... 150
10. Judgment—Estoppel—Matters Concluded.—In the prosecution of an offense wherein the accused is charged with being an habitual criminal, the latter charge being descriptive merely of the class of offenders to which the accused belongs and incidental and collateral to the main question or merits of the case, the parties are not concluded by a judgment in a former prosecution for another and distinct offense upon the issue involving the identical charges of former convictions for felony. *Id.* .. 150
11. Seduction—Subsequent Marriage.—Where a person charged with seduction under section 1214 of the Kentucky Statutes, marries the prosecuting witness and thereby suspends the prosecution, which is subsequently renewed upon his desertion of his wife, the offense remains as it was in the beginning —The seduction of an infant female under the promise of marriage, and two courses of procedure are open to the Commonwealth. One is to continue the indictment on the docket for three years, or to file it away with leave to re-docket upon notice; the other is to dismiss it, and if within three years of marriage, cause arises for resuming the prosecution, such as abandonment, to re-indict the defendant. *Miller v. Commonwealth* .. 201
12. Indeterminate Sentence Law.—The indeterminate sentence law applies only where the crime charged is committed after said law became effective. *Id.*..... 201
13. Trial—Formation of Jury—Appeal—Review.—Error of the court in the formation of a jury to try one charged with a crime or offense is not subject to review by the Court of Appeals. *Daniel, et al. v. Commonwealth.*..... 601
14. Appeal—Indictment—Hearing of Other Than Legal Evidence by Grand Jury—Action of Trial Court in Refusing to Set Aside Indictment—Review—Section 281, Criminal Code.—Under section 281, Criminal Code, the action of the trial court in refusing to set aside an indictment on the ground that the grand jury heard other than legal evidence is not subject to exception, and cannot be reviewed on appeal. *Smith v. Commonwealth* .. 613



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15. Witness—Impeachment—Collateral Issue.—Where on the trial of the defendant for knowingly, feloniously and corruptly swearing that two alleged participants in a murder were in the town of Jackson, 20 miles away from the scene of the murder, a witness for the Commonwealth testifies that the two men were present with him participating in the crime and also a third man, the whereabouts of the third man who participated in the crime was so much a part of the res gestae as to make it a direct and material issue instead of a collateral issue, and the defendant is not concluded by the answer of the Commonwealth's witness, but may show by other witnesses that the third party was as a matter of fact, not present at the scene of the crime, for the purpose of impeaching the Commonwealth's witness. Id..... 613
16. Witness—Interrogation by Court.—Although the trial court may interrogate a witness for the purpose of ascertaining the truth and bringing before the jury the real facts of the case, where there is nothing in the question or the manner of the interrogation from which the court's opinion of the facts or the weight of the evidence can be gathered, yet it is prejudicial error for the court to examine the witness in reference to a conversation he had with the court in such a manner as to make the court itself an impeaching witness. Id..... 614
17. Evidence—Rebuttal.—The trial court has a reasonable discretion in admitting testimony in chief by rebuttal witnesses, and it is only in rare instances that a reversal will be decreed because of the court's action in receiving evidence in rebuttal which should have been adduced in chief. Id..... 614
18. Trial—Evidence—Private Writings—Admissibility. — In a prosecution for assault with intent to have carnal knowledge of a female, an anonymous letter containing an offer of a reward in money to any girl who would prefer charges against the accused which would result in his prosecution, conviction and confinement in the penitentiary, if knowledge of the contents thereof are brought home to the prosecuting witness, is admissible as tending to show the motive of the prosecuting witness in investigating the prosecution. Unless such knowledge on the part of the prosecuting witness is shown, such writing is incompetent for any purpose. *Jones v. Commonwealth* . . . . . 640
19. Trial—Continuance—Affidavit as to Statements of Absent Witnesses.—It is error for the trial court to refuse a continuance, where trial is ordered at the indicting term and accused has filed his affidavit showing due diligence in procuring the attendance of material witnesses and setting forth facts the absent witnesses would swear to, if present, unless, with the consent of the Commonwealth attorney, such statements of the absent witnesses should be admitted by the Commonwealth to be true and so read to the jury. Id..... 641

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20. Intoxicating Liquors—Local Option Law—Violation—Evidence—Sufficiency.—On a prosecution for the offense of having in one's possession spirituous, vinous or malt liquors for the purpose of sale in local option territory, evidence examined and held sufficient to sustain a conviction. *Peters v. Commonwealth* ..... 689
21. Carnally Knowing an Idiot—Evidence of Idiocy.—In a prosecution for carnally knowing an idiot it is competent for the Commonwealth to prove by the neighbors and acquaintances of the female assaulted that she was an idiot, and the evidence of this class of witnesses is also admissible to show that she was not. *Jones v. Commonwealth* ..... 752
22. Carnally Knowing an Idiot—Instructions.—An instruction was proper that defined an idiot as "a person destitute of mind from birth, or a person of such weak and feeble mind existing from birth as renders her incapable of knowing right from wrong, or knowing, has not, by reason of such mental condition, if any, the will power to resist. And that at the time of the sexual intercourse with defendant, if any there was, she did not, by reason of such mental condition, if any, know that it was wrong, or if she knew that same was wrong, if they believe that by reason of such mental condition, if any, she had not the will power to resist the defendant's solicitation or suggestion that she have sexual intercourse with him, if any such there was, then she was in contemplation of law an idiot." *Id.* ..... 753
23. Degrees of Offenses.—Section 263 of the criminal code defines certain offenses that are to be treated as degrees of each other, but this section only applies to the class of offenses mentioned or referred to in it, and does not apply to the offense of carnally knowing an idiot. *Id.* ..... 753
24. Construction of Section 264 of the Code—Adultery Not Included in Carnally Knowing an Idiot.—This section, which provides "that if an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive or intention, the offense without the circumstances, or a part only, is included in the offense," is only applicable when the lesser and the greater offense, or the two offenses, if they be of the same nature, have some relation to or connection with each other. Neither the offense of fornication or adultery is included in the offense of carnally knowing an idiot, as there is no relation or similarity whatever between the two offenses. *Id.* ..... 753
25. Continuance—When Should Be Granted.—The defendant is in every case entitled to reasonable time and opportunity to prepare his defense, and if the court fails, upon a proper showing, to allow a continuance for this purpose, it will be grounds for reversal. *Samuels v. Commonwealth* ..... 758

## CRIMINAL LAW—Continued—

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26. Continuance—Facts Stated.—A negro on December third killed another negro. On the next day he was indicted, and being unable to employ counsel, the court appointed attorneys to defend him, and set his case for trial on December 9th, when it was tried and his punishment fixed at death. From the time of the homicide until the trial the accused was confined in jail, and the attorneys employed to defend him were busy in court in other cases and had no opportunity to investigate or prepare his defense. Held reversible error to refuse a continuance. *Id.* ..... 758
27. Indictment.—It not infrequently occurs that the same act may constitute, in whole or in part, two or more offenses; and in that event it is the accusative part of the indictment that determines the offense charged. *Commonwealth v. Kentucky Distilleries & Warehouse Company, et al.* ..... 787

## CROSSINGS—See Railroads.

## DAMAGES—See Attachment, 4; Master and Servant; Mines and Mining; Negligence; Verdict; Contracts; Railroads—

1. Action for Personal Injuries—Pleading—Limitation.—In an action brought by a resident of this State against another resident thereof to recover damages for a personal injury sustained in another State through the negligence of the defendant, the plaintiff may rest the action upon a statute of such other State authorizing a recovery for such injury, by properly pleading same, but the action must be instituted within the time required by the Statute of Limitation of this State. *Louisville & Nashville Railroad Company v. Burkhardt* ..... 92
2. Personal Injuries Sustained in Falling Through Cellar Door—When City and Trustees of Church Not Liable.—A cellar door at the side of a building which extends out on the side walk and extends up to the building, being higher at the building than at the sidewalk, is not placed there for the purpose of persons standing on it and looking into the building. Neither the trustees of the church nor the city are liable to persons thus standing on the cellar door for the purpose of watching the proceedings in the church, and injured by the falling of the cellar door, from its giving away under the weight put upon it, although the cellar door was in defective condition. *City of Louisville v. Hayden* ..... 258
3. Action for Breach of Contract—Contract of Employment—Change of Contract—Evidence.—Following an injury to appellee resulting in the amputation of a leg, appellant's ad-judge paid him \$260, and as appellee contends entered into a contract with him to give him employment for life. Upon being informed by the foreman that the appellant could not employ him, he instituted this action for damages for breach

## DAMAGES—Continued—

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- of contract. Upon the issue as to the change in the contract, the adjuster stated in general terms that the contract as written was the true contract, but he does not deny that he made the interlineation in it or that he read out the contract as claimed by appellee and his witness who was present at the time of its execution. *Mengel Box Company v. Hall*..... 384
4. Action for Breach of Contract—Instructions.—There is no merit in the contention that the court improperly refused to instruct the jury to find for defendant if they believed the adjuster had no authority to make the settlement for the reason that there was no evidence upon which to base such an instruction. *Id.* ..... 385
5. Overflow From Obstruction of Creek—Negligence—Measure of Damages.—The claim of damages asserted by appellee for the overflow of her two lots and the buildings thereon, having resulted from the obstruction of the waters of two creeks by abutments, piers and embankments erected by appellant in bridging the streams, the structures admittedly being of a permanent character, and not negligently constructed, it was properly held by the trial court that the case was one in which but a single recovery could be had; the measure of damages being the difference in the vendible value of the real estate just before and immediately after its overflow. *Chesapeake & Ohio Railway Company v. Robbins*..... 387
6. Overflow From Obstruction of Creek—Right of Action for.—Although the bridge abutments, piers and embankments causing the overflow of appellee's lots were erected in 1906, as it was not reasonably apparent to an ordinarily prudent person at the time of their completion, that they would so obstruct the waters of the two creeks as to cause them to overflow the lots, the right of action therefor did not then arise, but accrued after the overflow of the property in 1909, as it was not until the happening of that event that it became reasonably apparent to a person of ordinary prudence that the structures would cause injury to the property. *Id.*..... 387
7. Injury to Real Estate.—A party is not required to sue for damages to his real estate resulting from a permanent structure, until it becomes reasonably apparent that he has suffered such damages. *Id.* ..... 388
8. Contracts—Breach—Duty to Minimize.—Where one has contracted to do a specific work, at an agreed price, upon breach of the contract by the other party, he is under no duty to minimize the damages, unless the agreement exacts of him a personal service or inhibits him from engaging in other employment of like nature. *Owensboro Shovel & Tool Company v. Moore* ..... 431
9. Overflow from Obstruction of Creek—Negligence—Omission to Pass on Question Raised by Cross Appeal—Extension of Opinion.—In the original opinion in 154 Ky., 387, the question raised by appellees cross appeal was inadvertently overlooked.

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The claim for damages arising out of the overflow of the personal property was properly pleaded, and its consequent injury sufficiently alleged. There was no question of limitation, and appellee's right to a recovery of damages for the injury to the personal property is apparently as valid as was her claim for damages for injuries sustained to her real estate, and the lower court erred in sustaining the demurrer to the amended petition, so the judgment sustaining the demurrer to the amended petition is reversed, though the judgment from which the main appeal was prosecuted was properly affirmed. *Chesapeake & Ohio Railway Company v. Robbins*..... 581

## DEEDS—See Land; Action, 3; Vendor and Purchaser—

1. Construction—Distinct Interests or Titles.—A deed purporting to convey the undivided interest of the grantor in and to the land therein described, passes all interest of every character, then owned or claimed by the grantor in said lands. *Wilson v. Hoover, et al.*..... 1
2. When Deed Will Not Be Reformed for Grantor.—A deed will not be reformed for the grantor where it was written according to his instructions and he executed it understanding its purport. *Spradlin v. Spradlin, et al.*..... 54
3. When Deed Will Not Be Cancelled.—Where a deed provided that the grantee should give the grantors one-third of the crops during their lives, and should cut no timber from the land, it will not be cancelled where the grantee has cultivated the land according to the usual course of husbandry although the crops have fallen off; and it will not be cancelled for the cutting of timber which was done with the knowledge and consent of the grantors, although it provides that it shall be void if the grantee violates its stipulations. *Id.*..... 54
4. Reformation Mutual Mistake.—In an action to reform a deed on the ground of a mutual mistake of the parties evidence examined and held sufficient to support the decree of reformation. *Wilson, et al. v. Reynolds, et al.*..... 159
5. Construction.—Where the caption of a deed is to "George Hatfield and Mary Elender his wife during their natural life, thence descend to the heirs of their body of the second part," and the granting clause is "unto the said party of the second part, their heirs and assigns forever," and the habendum clause is "unto the said grantee their heirs and assigns forever," the grantees, George and Mary Elender Hatfield, take only a life estate. *Runyon v. Hatfield, et al.*..... 171
6. Deed Made by Widow Pursuant to Agreement With Husband.—A deed made by a mother to two of her children will not be disturbed at the instance of the other children on the ground of undue influence, when it appears that it was made pursuant to a plan agreed upon between her and her husband years before, although it makes an unequal distribution of

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- her estate, it not appearing how the husband's estate was distributed. *Gusler, et al. v. Hays; Same v. Same*..... 306
7. Construction—Defeasible Fee.—Where the habendum Clause in a deed is "to have and to hold the same unto the said Isaac W. Kelly and his heirs; but if the said Isaac W. Kelly die without issue then to the said Griffin Kelly and his heirs," the grantee acquires a defeasible fee, which he may devise in the event that he dies leaving issue. *Forquer v. Bovard, et al.* 377
8. Restraint on Alienation.—The language of a deed imposing certain restrictions on alienation examined, and the restraint held to apply only during the lifetime of the grantee, or after his death in the event that he died without issue. *Id.* 377
9. Designation of Street—Description—Easements.—Where a deed conveying a city lot designates the street upon which it fronts as one of the boundaries thereof, it will, in the absence of language showing a contrary intention, be construed as including the sidewalk in front of the lot and the street to the centre or middle thereof, subject to the free use of the sidewalk and street by the public. The fact that the description only brings the lot to the edge of the street can make no difference, for such description must be merely understood as specifying the ground the grantee may hold and use as exclusively his own, and as defining the line at which the public easement begins; the grantee owning subject to that easement, to the center of the street. *Bialock, et al. v. Atwood*..... 394
10. Boundaries—Easements—Title—Shade Trees.—As according to the above rule the deed carries the front boundary of the grantee's lot to the center of the street and passes to him the title to the ground included in the sidewalk and street to the center of the street, subject to the public easement, it necessarily passes to him the title to the shade trees that may be standing on the sidewalk in front of the lot, subject to the public easement; and if the sidewalk contain a shade tree which stands in part in front of his lot and in part in front of the lot of an adjoining owner, each owner will have a property right in so much of such tree as stands on his side of the line dividing the lots. *Id.*..... 394
11. Construction of.—In the construction of deeds, the effort of the court always is to get at the intention of the parties, and if the intention can be arrived at, although it may be out of touch with some expressions in or parts of the instrument, it will have a controlling influence in its interpretation. In construing a deed made by a father to the husband of his daughter and her heirs and assigns, coupled with the provision that the children of his daughter by a former marriage should share equally in the land with her other heirs, it is held that the grantee took a life estate with remainder to the children of his wife. *Hunt, et al. v. Hunt, et al.*..... 679

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DEMAND—See Estates.

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DESCENT AND DISTRIBUTION—See Remainders.

DESCRIPTION—See Deeds.

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DISCHARGE—See Attachment.

DISCRETION—See Pleading; Public Roads.

DISCRETION OF COURT—See Trial.

DISHONOR—See Banks.

DISMISSAL—See Appeal, 4.

DISORDERLY HOUSE—See Bawdy House.

DIVIDENDS—See Corporations.

## DIVORCE—

1. Alimony.—While without power to reverse a judgment granting a divorce, this court may review the facts of the case for the purpose of passing on the propriety of the chancellor's action in refusing alimony. *Griffin v. Griffin*..... 766
2. Alimony.—In an action for divorce and alimony, evidence examined, and held that the chancellor erred in refusing to award alimony to the wife. *Id.*..... 766
3. Alimony—Expectancy of Husband May Be Considered.—Where the husband is the only child and prospective heir of his widowed mother, his expectancy may be taken into consideration in fixing the alimony to which the wife is entitled. *Id.* .. - ..... 766
4. Alimony.—In an action by a wife for divorce and alimony, evidence examined, and alimony fixed at \$500. *Id.*..... 766

## DOWER—

1. Claim for Improvements Against Other Lands.—Where the widow of an intestate is allotted dower and also purchases the remainder of the intestate's land and in an action by her children, the deed to her is set aside on the ground that she was the administratrix of her husband, and the case is remanded

## DOWER—Continued—

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- to settle the accounts between her and the children, she cannot assert a claim for improvements erected on the land assigned her as dower. *Daniels v. Charles, et al.* ..... 232
2. Where an intestate's lands are leased before his death, and the widow is thereafter assigned dower in certain portions of his lands, she is not entitled to dower in the royalties paid on coal not mined from the dower land. *Id.*..... 232

## DRAINAGE—

**Appeal—Partial Transcript—Presumptions.**—The record of a proceeding in the county court, referred to and made a part of the record in an action to enjoin the collection of a drainage tax, not having been copied into transcript, upon appeal it will be presumed that such missing evidence supports the finding and judgment of the chancellor. *Board of Drainage Commissioners of Ballard County v. Henderson.*..... 350

**DYING DECLARATION**—See Homicide.

**EASEMENTS**—See Deeds, 9-10—

1. **Action to Be Adjudged Owner of Passway—Evidence—Instructions.**—In an action seeking to be adjudged the owner of and entitled to the use of a passway and for damages for its construction, the jury under a peremptory instruction finding for defendants on the question of title, but finding that plaintiffs had a right of passway under submission on that question, upon appeal by the defendants as to plaintiffs' right of easement, there being no cross appeal by defendants, the questions of title and damage are eliminated, and the evidence as to whether the use was exercised as a matter of right, or was merely permissive, being irreconcilable, and the instructions properly submitting the issue, the judgment must be affirmed. *Cooper, et al. v. Washington, et al.*..... 248
2. **Title—Evidence—Introduction of Incompetent Evidence—Harmless Error.**—In an action seeking to be adjudged the owner of and entitled to the use of a passway, the jury finding for defendants on the question of title under a peremptory instruction, the introduction of testimony by plaintiffs as to the giving of land for the passway by their ancestor and the remote vendor of defendants, and an instruction based upon it was harmless error. If the title to the land was in defendants as the court instructed the jury the jury could not have found that plaintiffs had the right to use the passway under an agreement with their vendor. *Id.*..... 248
3. **Appurtenant—Steamboat Landing—Conveyance of—Right to Use and Occupy Other Lands of Grantor.**—Where a grantor conveys a particular steamboat landing and certain described land to which it is appurtenant, the destruction of that land



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- by erosion gives to the grantee no right to use and occupy other lands of the grantor for the purpose of landing boats.  
**Brown v. Threlkeld's Guardian**..... 834

**EJECTMENT—**

1. **Finding of Court—Evidence—Sufficiency.**—In an action of ejectment, evidence examined and held to sustain finding in favor of plaintiff. **Brown v. Threlkeld's Guardian**..... 834
2. **Title From Common Source.**—When both parties to an ejectment suit claim title under a common source, it is not necessary for the plaintiff to trace his title farther back than the source from and under which both claim. **Jones, et al. v. Lickliter** .. . 848

**ELECTIONS—See Local Option Election—**

1. **Not an Election Within Meaning of Constitution—Legislature May Enact Law Requiring Nominations to be Made by and Prescribe Manner and Conduct of.**—As a primary election is not an election within the meaning of the Constitution, and there is no provision of that instrument which prohibits the Legislature from enacting a law requiring party nominations to be made by means of primary elections, it necessarily follows that it was competent for it to provide by law that nominations of party candidates for office shall be made in no other way; to prescribe the time of holding and manner of conducting the primary elections by which such nominations are to be made; and also to impose such reasonable conditions and test as to party membership or affiliation, as shall entitle those seeking party nominations to get their names upon their party's ballot as candidates. **Hager, Clerk v. Robinson; Same v. Turner, et al.**..... 489
2. **Act Providing For—Constitutionality of.**—The Act entitled "An Act to provide for the nomination of candidates by political parties at primary elections and for placing the names of candidates on the ballots to be voted for at the general election; and prescribing penalties for the violation thereof;" approved March 5, 1912, is not in any of the particulars indicated in these cases, unconstitutional. **Id.**..... 489
3. **Act Providing for—Constitutionality of.**—The provision in section 6 of the act, which requires the petition of one seeking to have his name placed on his party's ballot as a candidate at the primary election, for its nomination to an office, to state that he "affiliated with such party and supported its nominees at the last regular election," is not an unreasonable requirement nor is it violative of sections 1, 6, or 147, of the Constitution; the first declaring freedom and equality, inherent and in alienable rights common to all men; the second that all elections shall be free and equal; and the third, that

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- all elections by the people "shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter at the polls and then and there deposited." Id. .... 489
4. Supporting Party Nominees—How Support May Be Rendered.—The words "supported its nominees" do not necessarily mean that the candidate should have voted for such nominees. Without voting at all, he may have given them active support by advocating their claims, assisting in getting out the vote, &c., yet by accident or unavoidable casualty have been prevented from attending or voting at the election. The requirement even if compliance therewith be construed to amount to an admission from the candidate that he voted at the last regular election for the nominees of the party whose nomination he would seek in the primary, does not violate section 147, Constitution, which was designed to protect the secrecy of the ballot, and not the secrecy of party or political belief. Id. .... 490
5. Object of Act Providing For.—The primary election statute was enacted to promote and maintain party organization and the integrity of party nominations; therefore, open declaration of party allegiance, both on the part of candidates who seek party nominations and voters who confer them, is absolutely essential to the proper working of any primary law. Id. .... 490
6. Exclusion of Candidate From Ballot—Judgment—Court of Appeals Without Jurisdiction to Review.—As section 27 of the primary election act, restricts candidates whose names may have been wrongfully or erroneously excluded from the primary election ballot, to the summary remedy prescribed therein for righting such wrong or error, and expressly disallows to the candidate or wrongdoer any appeal from the judgment or order the circuit or county judge may enter in the proceeding, the Court of Appeals is without jurisdiction to entertain an appeal from or to review such judgment or order. Id. .... 490
7. As section 27 only requires the candidate, whose name has been wrongfully or erroneously refused a place on a party ballot in the primary, to resort to the remedy and follow the procedure it prescribes, it does not prevent electors of the party, whose rights under the act may have been violated, from proceeding by mandamus, as allowed by section 474 Civil Code, to enforce such rights; nor does section 27 deprive them of the right of appeal. Id. .... 490
8. Requirements of One Becoming a Candidate in.—One who files his petition to become a candidate for a party nomination in the State primary election must, as required by section 6 of the primary election act in order to get his name on the party ballot, state therein, 1, that he is a qualified elector;

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- (1. e. of the party whose nominations he seeks; 2, that he is a member of such party; 3, that he affiliated with such party and supported its nominees at the last regular election. *Gardner v. Ray*, Clerk; *Ewald v. Same*; *Tyler, et al v. Same*; *Johnson, et al. v. Same*..... 509
9. "Qualified Elector"—Definition of.—In a municipality where registration obtains, both registration and declaration of party affiliation are required by section 19 of the act, to qualify voters to participate in primary elections. The qualifications of electors being defined by section 19, that definition must be applied to the term "qualified elector" in section 6. *Id.*..... 509
10. Constitutionality of Act Providing for.—The act is not repugnant to the Fourteenth Amendment to the Constitution of the United States, as it does not abridge any privilege or immunity of a citizen of the United States. The privileges and immunities therein protected are those which arise out of the nature and essential character of the national government, the National Constitution, the National treaties, or the acts of Congress, as distinguished from those belonging to the citizens of the State. *Id.*..... 509
11. Constitutionality of Act Providing for—Province of Legislature.—In enacting the present primary election law the Legislature did not, in so far as the objections made to its constitutionality in these two cases are concerned, transcend its powers, the question as raised being wholly political and relating wholly to the manner in which the Legislature exercising its power, are matters with respect to which the Legislature was more competent to decide than are the courts. *Id.* .. 509
12. Appeal.—No appeal lies to this court from a decision of a circuit court directing a county clerk to accept as sufficient a petition nominating a person as a candidate in a primary election. *Lewis, Clerk v. Bullock*..... 538
13. Contest—Time of Instituting.—Under the primary election law, the five days allowed for instituting the contest, must be counted from the issuing of the certificate, including the day on which the certificate is issued. *Price v. Russell*; *Coleman v. Morgan* ..... 824
14. Notice of Contest—Service of.—The notice of contest must not only be put in the hands of the sheriff within five days, but it must be served on the defendant within that time, unless he absents himself or otherwise prevents the service. If the notice is not served in time, the proceeding cannot be maintained. *Id.* .. 824
15. Judgment of Court of Appeals is Final—Correction of.—In primary election contests the judgment of the Court of Appeals is final when entered and the result will be certified directly to the proper officers. But the court will correct any error thereafter on reasonable application. *Id.*..... 825

EMPLOYMENT OF COUNSEL—See Corporations. Page

ENDORSERS—See Banks; Bills and Notes.

EQUITY—See Action.

ESTATES—See Dower; Executors and Administrators—

Demand Against Estate of Decedent—Verification.—Every demand against the estate of a decedent must be verified by the affidavit of the claimant showing its justness and no judgment can be entered until such affidavit is filed. But this does not affect the verdict and on a return of the case a judgment may be entered upon the verdict after the proper affidavit is filed. Graves, Admr. v. City of Georgetown..... 207

ESTOPPEL—See Banks, 3; Criminal Law, 10; Husband and Wife, 1; Judgment—

1. Claim in Judicial Proceedings—Matters Concluded.—A party who has, with knowledge of the facts and without fault of the adverse party, assumed and successfully maintained a particular position or claim in judicial proceedings, is estopped to take a conflicting position or to make an inconsistent claim, to the prejudice of the adverse party, in subsequent judicial proceedings where the parties and issues are the same. Carter v. Jordon, et al..... 75
2. Plea of.—Matter constituting an estoppel cannot be shown under a traverse. Brackett v. Modern Brotherhood of America. - ..... 340
3. Ratification—Intent to Ratify Must Be Shown.—Before there can be an estoppel, or before one's acts will be deemed to have been a ratification, it is essential that he should be in full possession of all the facts about the transaction, and being in possession of such facts, his conduct with reference thereto must be such as to show an intention to ratify what was otherwise an unauthorized act upon his part, or that of his agent. Lebus, et al. v. Stansifer, et al..... 445

EVIDENCE—See Attachment; Criminal Law; Malicious Prosecution; Action; Easements; Master and Servant; Pleading; Railroads; Trial; Finding of Chancellor; False Swearing; Contracts; Judgment, 7; Larceny; Verdict; Homicide; Insurance, Fire; Partition—

1. Letter—Proof of Contents—Practice—Where a letter is in the possession of the adverse party it is the proper practice to give him reasonable notice to produce it, before receiving other proof of its contents. Connecticut Fire Insurance Company v. Moore ..... 19
2. Will Contest—Testator's Mental Condition.—It is admissible to show the mental condition of the testator at the time his

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- will was made, and his susceptibility to influence by which he was surrounded at the time; but it must be accompanied by some other evidence that the will was executed as the result of undue influence before the case will be permitted to go to the jury. *Crump, et al. v. Chenault, et al.*..... 188
3. In Will Contest—What Is Evidence.—The foregoing rule does not conflict with the *scintilla* rule, since that rule requires some evidence, even though it be slight; and by evidence is meant something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of proof or having fitness to induce conviction. *Id.*..... 188
4. Criminal Law—Seduction.—Where a man indicted for seduction under section 1214 of the Kentucky Statutes, marries the prosecuting witness and the prosecution is thereby suspended, but is subsequently renewed after he had deserted his wife, she is a competent witness against him by virtue of the terms of the statute which provides that upon his abandonment of his wife the prosecution “shall be renewed and proceed as though no marriage had taken place.” *Miller v. Commonwealth* ..... 201
5. Statements of Unauthorized Persons to Induce Injured Servant to Settle Claim Not Competent.—Where an injured servant was approached by persons not authorized to settle his claim, statements made to him by them are not competent in an action by the servant to recover damages from the master. *Louisville & Nashville Railroad Company v. Lee*..... 226
6. *Res Gestae*.—Evidence of a Statement made by the injured party two or three minutes after he was injured is admissible as a part of the *res gestae*. *Louisville & Nashville Railroad Company v. Miller* ..... 236
7. Improper Admission—Error.—In an action for damages for personal injuries, statements of plaintiff’s mother to the effect that when plaintiff reached her house after he was injured she regarded his condition as serious because he was complaining, groaning and “taking on,” even though inadmissible, is not of sufficient importance to justify a reversal. *Id.*..... 236
8. Action Against Railroad for Death—Manner of Death May Be Established by Circumstances—Negligence.—Although no witness saw the deceased when he was killed, the fact that he was killed in a certain way may be established by circumstances as fully as by direct testimony. *Louisville & Interurban Railroad Company v. Hardin’s Admr.*..... 282
9. Incorporation—How Shown.—In order to show, that the defendant is a corporation created under the laws of this State, it is only necessary to show the *de facto* existence of such corporation; and that may be established by evidence tending to show that it acted and was accepted in the community as a corporation under the name alleged. *Louisville & Nashville Railroad Company v. Commonwealth*..... 293

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10. Judicial Notice.—Under section 1624 of the Kentucky Statutes, which requires the courts of this State to take judicial notice of the acts of the General Assembly, the courts will take judicial notice that a corporation created by legislative act, is a corporation. *Id.*..... 294
11. Bills and Notes—Endorsers—Parol Evidence.—Where a note is endorsed by two persons and the words "without recourse" are added to such endorsement and occupy such position with reference thereto that ambiguity arises as to which of said endorsements they are intended to apply, parol evidence is admissible to show to which endorsement such words are applicable. *Goolrick, et al. v. Wallace, et al.*..... 596
12. Witness.—Where the conductor of a train denies that plaintiff's decedent was riding on a train with his knowledge and consent, evidence of a statement by him showing the contrary is admissible for the purpose of impeaching him. *Chicago, St. Louis & New Orleans Railroad Company, et al. v. Benedict's Administrator* ..... 675
13. Record—Oral Evidence.—Where defendant is notified to produce a record and fails to do so, oral evidence of its contents is admissible if the record itself is admissible. *Id.*..... 675
14. Record.—A written report by an engineer handling an engine just before an accident, to the effect that the engine was defective, and filed in the round house is competent on the question of notice. *Id.* ..... 675
15. False Swearing—Pendency of Prosecution—Record—Parol Proof.—On a trial for false swearing, where there is a record of the proceeding at which it is alleged the false testimony was given, parol evidence of the pendency of that proceeding is inadmissible in the absence of the loss of such record. *Partin v. Commonwealth* ..... 701

## EXECUTIONS—

1. Joint Judgment—Validity of Execution Against Survivor Alone—Section 405, Civil Code.—Where one of two joint judgment debtors is dead an execution against the survivor alone is valid as to him. *Letton's Admr., et al. v. Rafferty, et al.*..... 278
2. Validity of Execution in Excess of Judgment Debt.—An execution which fails to allow a credit shown on the judgment is not void, but may in a proper proceeding be quashed to the extent of the excess only. *Id.*..... 278

## EXECUTORS AND ADMINISTRATORS—See Wills—

1. Sale of Land by—When Purchaser of Cannot Insist Upon Purchase.—An executor who is authorized to sell enough land to pay the debts of the estate is without authority to sell more land than is reasonably necessary for this purpose, and a purchaser from him with notice of his want of authority, can-

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- not insist upon his purchase. *Tarpy, et al. v. Lexington & Eastern Railroad Company* ..... 345
2. Purchase of Land at Judicial Sale by Administrator—Title.—When land is purchased at a judicial sale by an administrator, the purchase will have the effect of vesting in him title to the land as trustee for the benefit of the heirs of his intestate. *Jones, et al. v. Lickliter*..... 848

**EXEMPLARY DAMAGES—See Trespass, 3.****EXEMPTION—See Schools and School Districts; Taxation.****EXHIBITS—See Homicide.****FALSE PRETENSES—See Corporations.****FALSE SWEARING—See Evidence, 15; Instructions, 7; Indictment, 4—**

1. Acquittal of Defendant—Effect on Prosecution Against Witness Who Gave False Testimony.—The acquittal of the defendant on a trial at which it is alleged a witness other than the defendant testified falsely does not prevent the conviction of such witness for false swearing. *Partin v. Commonwealth* 701
2. Materiality—Relevancy of Alleged False Testimony—Question for Court.—On a trial for false swearing it is not necessary that the alleged false testimony be material; it is only necessary that it be relevant, and its relevancy is a question for the court and not for the jury. *Id.*..... 701

**FINAL ORDER—See Appeal.****FINDING OF CHANCELLOR—See Action; Trespass—**

1. Substantial Justice.—Where, upon a consideration of the whole case, it appears that the judgment of the chancellor did substantial justice between the parties, it will not be disturbed. *Daniels v. Charles, et al.*..... 232
2. Some weight will be given the finding of the chancellor on a question of fact, and his finding will not be disturbed on doubtful evidence. *Gusler v. Hays; Same v. Same*..... 306
3. Evidence.—In an action by a sub-contractor against a contractor to recover balance due on several contracts, evidence examined and held to sustain the finding of the chancellor as to certain items. *Caldwell & Drake v. Pierce*..... 328
4. Finding of Chancellor.—The chancellor's finding of fact will not be disturbed on doubtful evidence. *Maddox v. Rowe, Assignee* .. 417

## FISCAL COURTS—

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- Power to Validate and Ratify Void Contract.**—The contract attempted to be made by a special commissioner with a contractor for the maintenance of the public roads of the county was one which was within the power of the fiscal court to make, and the fact that its agent did not take the required steps to make it a binding obligation, does not deprive the governing body of the county of the power to thereafter validate and ratify it so as to make it binding from the beginning, and the attempt upon the part of the fiscal court to carry out the contract attempted to be made by its commissioner will be treated as a ratification of his acts, and make the contract relate back to the original transaction. *Kelly, et al. v. Lockwood, et al.* ..... 544

**FORFEITURE**—See Homestead, 3; Insurance, Fire.

**FORMER CONVICTION**—See Judgment.

**FRANCHISE**—See Municipal Corporations.

**FRATERNAL INSURANCE**—See Insurance, Life.

**FRAUD**—See Banks; Contract, 5; Corporations; Action, 3, Vendor and Purchaser, 4—

**Action to Set Aside Contract for—Specifications of Petition.**—Where the petition in an action to set aside a contract on the ground of fraud, specifies the particular fraud relied on, the plaintiff will be confined to evidence in support of his specifications. *Southern Insurance Company, et al. v. Milligan* ..... 216

**GUARDIAN AD LITEM**—See Infants.

**HARMLESS ERROR**—See Appeal, 9; Easements, 2.

**HEALTH**—See County Board of Health; County Health Officer.

## HIGHWAYS—

1. **Obstruction of—Objects That Will Frighten Horses—Rights of Telephone Company.**—A telephone company that had the right to erect poles and string its wires along the right of way of a public road may put coils of wire to be used in stringing its line on the right of way of the road without subjecting itself to liability on account of horses being frightened thereby. *East Tennessee Telephone Company v. Parsons; Same v. Same* ..... 301
2. **All Parts of Set Aside for Public Use.**—All parts of a public road are set apart for public use, and it is actionable negli-



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- gence to unlawfully or without right place any nuisance or obstruction therein. *Id.* ..... 802
3. Nuisance in Right of Way Outside of Traveled Part.—An unlawful or unauthorized obstruction or nuisance on the right of way of a public road, although it may be outside the traveled part, may be the basis of an action, if it is calculated to frighten a reasonably gentle horse. *Id.*..... 802
4. Difference Between Liability for Placing Obstruction in the Traveled Part and Outside of It.—It is not permissible, for persons not authorized so to do, to place any sort of obstacle in the traveled part of the road that will obstruct or interfere with its use, while in many instances it is legitimate to place and permit to remain on the side of the road, outside of the traveled part, objects which, if placed in the traveled part, would constitute an obstruction. *Id.*..... 802
5. Difference Between the Rights and Liabilities of Those Who Have the Right to Use the Right of Way and Those Who Have Not.—Whether liability attaches to a person who places objects and things on the side of a road depends largely on whether or not he had the right to do so rather than on the character or shape or kind of object that was placed, as a person having the right to do so may with freedom from liability place many things on the right of way that a person not having such right could not safely do. *Id.*..... 802
6. Objects Calculated to Frighten Horses—Rule.—The mere fact that an object on the side of a road is calculated to frighten a reasonably gentle horse is not the sole standard by which the liability of the party placing it there is to be measured in an action by a person injured by the fright of his horse; nor does the fact that the objects placed on the side of the road are new and unusual things in the conduct of the business of the persons having the right to place them, increase their liability. *Id.* ..... 802
7. Objects That Will Frighten Horses—Question for Jury.—The general rule is that it is for the jury to say whether the thing complained of was calculated to frighten a reasonably gentle horse, but this does not mean that every time a horse becomes frightened at an object rightfully placed on the side of the road that the question must be left to the jury. It is only the right of the jury to pass on questions like this when there may be reasonable grounds for difference of opinion as to whether the object was rightfully placed on the road and from its size and appearance calculated to frighten horses. *Id.* .. . 802
8. Reasonable Time in Which Telephone Company May Use Wire Placed on Side of Road.—Where a telephone company, in the erection of a new line, placed coils of wire on the side of the road, to be used in erecting a line, it might leave them there

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for several days without subjecting itself to liability on the ground that they were there an unreasonable length of time.

Id. . . . . 802

## HOMESTEAD—

1. Value—Action to Partition—Evidence.—In an action by the children of an intestate against his widow to partition his lands claimed by her as a homestead, evidence examined and held insufficient to sustain the finding of the chancellor that the lands were worth more than \$1,000. *Farmer, et al. v. Hampton, et al.* . . . . . 83
2. Lands Included.—A tract of land distant from the home place about 300 yards which is used and cultivated by the owner in connection with his home place is included within his homestead where it, together with his other lands, did not exceed \$1,000 in value. *Id.* . . . . . 83
3. Forfeiture—Adultery of Wife—Section 2133, Ky. Stats.—In an action by the children of an intestate to recover and partition his lands on the ground that his widow by living in adultery had forfeited her homestead therein, evidence examined and held insufficient to sustain the charge of adultery. *Id.* . . . . . 83
4. Abandonment—Evidence.—Where land belonging to defendant was sold under an execution, and defendant's grantee, claiming that the land was occupied by defendant and his family as a homestead, resisted a motion to award writ of possession to the purchaser at the execution sale, evidence examined and held to sustain the finding of the trial court that the homestead had not been abandoned. *Baker v. Estridge, et al.* . . . . . 659

## HOMICIDE—See New Trial, 3—

1. Evidence—Dying Declaration.—Where the deceased is mortally wounded and is told by the attending physician that he will not get well and remarks that he hates to die on account of his children his dying declaration is admissible as it appears that it was made when the deceased had abandoned all hope of life and with a sense of impending dissolution. *Begley v. Commonwealth* . . . . . 30
2. Instructions.—In a prosecution for homicide evidence examined and held sufficient to justify an instruction on the reckless handling of a pistol. *Id.* . . . . . 30
3. Instructions—Involuntary Manslaughter.—In a prosecution for homicide the evidence examined and held that the failure to give an instruction on involuntary manslaughter was not prejudicial error. *Id.* . . . . . 30

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4. Evidence—Self-Defense—Uncommunicated Threats—Evidence of uncommunicated threats by deceased against accused is admissible to show the state of mind of the deceased, at the time of homicide, and also to show who was the aggressor. *Gabbard v. Commonwealth* ..... 140
5. Appeal—Harmless Error.—Where it appears that evidence of uncommunicated threats would throw light upon the question of the state of mind of the deceased, or who was the aggressor, at the time of the homicide, it is error to exclude such evidence. But, where such evidence is cumulative and the record shows the accused to be the aggressor and that he has had a fair trial, no reversal should be ordered because of the exclusion of such evidence. *Id.* ..... 141
6. When No Eye Witness—Circumstantial Evidence—Instructions.—In case of homicide to which there is no eye witness, and the Commonwealth must rely wholly upon circumstantial evidence in attempting to prove the guilt of the accused, the trial court should instruct the jury upon the law as to murder, voluntary manslaughter and self-defense as well as on the subject of reasonable doubt. *McElwain v. Commonwealth*..... 242
7. Circumstantial Evidence—Instructions.—The above rule does not apply, however where the testimony of an eye witness to the homicide, supported by a strong chain of circumstantial evidence, shows the crime to have been committed premeditatedly and with malice aforethought, and the only defense interposed is the defendant's personal denial of guilt and an attempted alibi. As in such case the crime is murder or nothing, an instruction as to murder and reasonable doubt will give the jury all the law required for their guidance in arriving at a verdict. *Id.* ..... 242
8. Evidence—Exhibit of Shells Found at Place of Killing.—As a breech loader double barrel shot gun was used in killing the deceased and three or more shots were fired in committing the crime, it was competent to exhibit to the jury two empty gun shells, indentified as having been found at the place of the killing, upon a showing that they were of the kind and quality required for use with such a gun as the defendant was shown to have had in his possession at the time of the killing. *Id.*..... 243
9. Evidence—Exhibit of Pieces of Deceased's Skull.—As according to uncontradicted evidence the shots by which deceased was killed tore away the top of his head and scattered parts of the brain and skull on the ground where his body lay, it was competent, after identifying them as the same found with the body, to exhibit the pieces of skull in evidence to the jury, without proving by a surgeon or anatomist that they were parts of the skull of a human being. *Id.* ..... 243
10. Oath to Sheriff and Deputies to Summon Jurors—Failure of Court to Administer Oath to Deputy.—As to the contention that one of the deputy sheriffs who assisted in summoning by-

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- standers was not sworn as required by section 2262 of the Kentucky Statutes, while it appears that the deputy sheriff referred to was not sworn at the beginning of the term when the sheriff and his other deputies are sworn, and that he did summon several who were examined as to their qualifications for jurors, there is nothing in the record to show whether any one of those summoned by this deputy was accepted as a juror. *Thurman v. Commonwealth*..... 556
11. Evidence—Conflict of—Instructions.—While there is an irreconcilable conflict as to whether appellant or deceased first renewed the difficulty that resulted in the killing of deceased, there was such evidence as justified the court in submitting this question which it did in carefully worded and well drawn instructions, and on the whole case no prejudicial error was committed upon the trial. *Id.* ..... 556
12. Evidence—Dying Declarations—Admissibility.—In a prosecution for homicide, statements of the injured party, made under a positive and absolute belief that his death is certain to ensue, and death results, are admissible as dying declarations, without regard to length of time intervening between the time of making the statements and his death. *Daniel, et al. v. Commonwealth* ..... 601
13. Conspiracy—Trial—Instructions.—In a prosecution for homicide as a result of conspiracy, instructions are not erroneous, under which the jury, before it was authorized to find any one of the accused guilty, it was necessary to find from the evidence, beyond a reasonable doubt, first, that a conspiracy had been formed by the accused, to commit murder, second, that, in pursuance of said conspiracy, murder was committed by one or more of the accused, or by some other unknown person or persons, and third, that the others of accused were then and there present or conveniently near aiding them in so doing. *Id.* ..... 601
14. Conspiracy—Appeal—Review—Evidence—Weight and Sufficiency.—In a prosecution for homicide as a result of conspiracy, evidence held to support verdict and judgment. *Id.*..... 601
15. Criminal Law—Motion for Continuance.—Where the trial court in overruling appellant's motion for a continuance, held that he might read the affidavit stating what absent witnesses would testify if present, which privilege he did not take advantage of, there is no merit in the contention that the court erred in refusing a continuance. *Elliott v. Commonwealth*.... 696
16. Criminal Law—Evidence of Accomplices—Corroboration.—The claim that the evidence of the accomplices is not sufficiently corroborated to justify conviction cannot be upheld. Several witnesses testified that they saw appellant at the scene of the shooting shortly after it occurred with a pistol in his hand, and one or more witnesses testified that appellant on that day admitted that he had done the killing, and this evidence taken

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- in connection with the evidence of the accomplices that appellant did the shooting justified the jury in reaching the conclusion it did. Id. .... 696
17. Involuntary Manslaughter—Voluntary Manslaughter—Accidental and Unintentional Killing—Instructions.—It has been the uniform ruling of this court in cases where homicide is claimed to be accidental, and there is any evidence to justify it, that it is the duty of the trial court not only to give an instruction upon accidental and unintentional killing, but do give one based upon the reckless or grossly careless use of fire arms constituting voluntary manslaughter. *Wayne (alias Wing) v. Commonwealth* - - - - - 698
18. Involuntary Manslaughter—Voluntary Manslaughter—Accidental Killing—Instructions.—Where the jury might very well have believed from the evidence that the killing was unintentional, but believe at the same time that appellant was so careless and reckless in handling the pistol that he ought to have been punished more severely than by a fine and jail sentence, under an involuntary manslaughter instruction the jury had no alternative except to adjudge him guilty of involuntary manslaughter, and thereby impose the small penalty of fine and imprisonment, or inflict the extreme penalty of life imprisonment, or death, and under the evidence and rule referred to, the failure to give an instruction upon voluntary manslaughter was error. Id. .... 698

## HORSE STEALING—See Larceny.

## HUSBAND AND WIFE—See Action; Land; Married Women; Divorce—

1. Antenuptial Marriage Settlements—Estoppel.—Where it is apparent that both parties to an antenuptial marriage settlement intended that the title of the wife to lands agreed to be conveyed should vest at once, the husband and those claiming under him are estopped to deny that her title thereto is not perfect, in so far as the husband could make it. *Smith's Executor, et al. v. Johns* ..... 274
2. Wife's Separate Estate—Husband as Trustee—Rents—Accounting.—A wife, in permitting her husband to manage and collect rents from her separate estate, does not waive her right to have him account to her for such rents. Id. .... 274
3. Evidence—Presumptions.—In the absence of an agreement or understanding to the contrary, the husband in collecting rents and receiving income from the wife's separate estate will be treated as her trustee. Id. .... 274
4. Contracts.—It being the duty of the husband to support the wife in a style befitting their station, the wife is not liable to the husband for expense of keeping her live stock or for money expended for her benefit in the absence of an agreement to pay or reimburse him. Id. .... 275

IMPEACHMENT—See Criminal Law, 15.

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IMPROVEMENTS—See Dower.

INCORPORATION—See Evidence, 9.

INDEMNITY—See Sureties—

1. Right of Indemnatee to Satisfy His Liability by the Execution of a Note.—An indemnatee who has incurred liability may satisfy the same by the execution in good faith of his note to the creditor and assert a claim for the amount of the note against the indemnitor. *Wilson v. Hite's Exr.*..... 62
2. When Indemnatee May Not Assert Claim Against Indemnitor.—An indemnatee cannot assert a claim against his indemnitor on a fictitious or pretended liability, or on account of the payment of a debt that he was not legally liable for, or when he obstructs or defeats litigation through which he might be saved from loss, or by the execution of a note that is accepted by the creditor merely for the purpose of making a claim that the indemnatee may present against his indemnitor. *Id.*..... 62

INDETERMINATE SENTENCE LAW—See Criminal Law, 12.

INDICTMENT—See Criminal Law; Evidence; Intoxicating Liquors; Bawdy House; Common Law—

1. Endorsement—Record.—An indictment which bears on its cover an endorsement that it has been received from the hands of the foreman of the grand jury in its presence in open court and filed in open court which endorsement is signed by the clerk, is a sufficient compliance with the code, without such endorsement being copied into the order book. *Daniel, et al. v. Commonwealth.*..... 601
2. Conspiracy—Sufficiency and Certainty.—The purpose of an indictment is to advise the accused of the offense with which he stands charged and for which he is to be tried. An indictment for conspiracy, which charged the defendants with combining together for an unlawful purpose, and in furtherance of such unlawful purpose, they or some of them or some unknown person acting with them committed the unlawful act, the others being then and there conveniently near aiding and abetting sufficiently, charges all with being principals, and the indictment is good. *Id.*..... 601
3. Alternative Pleading Not Authorized by Criminal Code.—Alternative pleading is not authorized by the Criminal Code, therefore an indictment charging defendant with having sworn falsely upon one or two occasions when he made conflicting statements under oath, but stating that the grand jury did not know which statement was true is insufficient. *Coulter v. Commonwealth* ..... 793

## INDICTMENT—Continued—

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4. False Swearing.—In an indictment for false swearing the alleged false statement must be negatived by special averment. *Id.* ..... 793
5. Sufficiency of Allegation—Larceny.—An allegation in an indictment that the defendant took a pocketbook and \$110 in money from the person of A, is a sufficient allegation that the defendant took and carried away the property. *Sutton v. Commonwealth* ..... 793

## INFANTS—

1. Sale of Infant's Real Estate.—It is firmly settled by an unbroken line of decisions of this court that the powers of courts of equity to sell an infant's real estate, or that of persons under disability, are statutory and not inherent; and that the statute providing for such a sale must be followed. *Caulder, et al. v. Chenault's Executor.* ..... 777
2. Appointment of Guardian Ad Litem.—Where a Guardian ad litem for an infant defendant was prematurely appointed before the infant had been properly summoned, and the court subsequently entered an order approving and ratifying the former appointment of the guardian ad litem who thereafter filed his answer as required by law, the order of approval and ratification was equivalent to a re-appointment of the guardian ad litem, and his subsequent representation of the infant by filing his answer, satisfied the requirements of the Code of Practice. *Id.* .. ..... 777

INHERITANCE—See Remainders.

INSANE DELUSION—See Instructions, 5.

INSANE PERSONS—See Criminal Law;

INSPECTION—See Mandamus.

INSTRUCTIONS—See Carriers; Homicide; Mines and Mining, 3; Verdict; Appeal; Easements; Contracts; Homicide; Master and Servant; Land; Trial; Intoxicating Liquors; Larceny—

1. Refusal to Give Peremptory Instruction—Former Appeal—Submission.—As to the contention by appellant that a peremptory instruction should have been given, it is sufficient to say that it was expressly held on the former appeal that the case should have been submitted to the jury. *Louisville and Nashville Railroad Company v. Cox.* ..... 100
2. When Complaint Cannot Be Made of.—No complaint of the instructions can be urged on appeal if they are not complained of in the grounds for new trial. *Mann Brothers v. City of Henderson* .. ..... 154

## INSTRUCTIONS—Continued—

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3. Contributory Negligence.—It is unnecessary that in the first instruction anything should be said as to contributory negligence, when in another instruction the jury is told that although the defendant was negligent as set out in No. 1, there could be no recovery if the deceased was guilty of contributory negligence but for which he would not have been injured. *Louisville & Interurban Railroad Company v. Hardin's Admr.* 282
4. Action for Personal Injuries—Evidence of Intoxication of Plaintiff—Submission of Issue.—While in an instruction defining ordinary care, evidence of plaintiff's intoxication at the time of the injury was not submitted to the jury, this phase of the matter was properly set forth in an instruction on contributory negligence, and the two instructions taken together fairly submitted these issues to the jury. *Cincinnati, New Orleans & Texas Pacific Railway Company v. Reed*..... 381
5. Wills—Insane Delusion.—An instruction on insane delusion on the part of the testator about his children was properly refused where the evidence failed to show such delusion on his part. *Brewer v. Brewer, et al.*..... 662
6. An instruction which fails to define an emergency in which plaintiff may act as one created by the negligence of the defendant is not prejudicial where no other emergency existed. *Chicago, St. L. & N. O. R. R. Co., et al. v. Benedict's Admr.*..... 675
7. False Swearing.—An instruction telling the jury that before they can find the defendant guilty of the crime of false swearing they must not only believe from the evidence beyond a reasonable doubt that he has been proven guilty, but that each substantive fact necessary to make out the crime, as set forth in the preceding instruction, must be supported by evidence of two witnesses or one witness and strong corroborative circumstances, is erroneous. The court should have told the jury that they must acquit the defendant unless it be proven that he swore falsely by two witnesses, or by one witness and strong corroborative circumstances. *Partin v. Commonwealth* 701
8. New Trial—Appeal.—Instructions not complained of in the grounds for new trial cannot be considered on appeal, although excepted to at the time they were given. *Trosper Coal Company v. Rader* ..... 671

## INSURANCE, FIRE—

1. Additional Insurance—Waiver—Evidence.—Evidence that an agent at the time of the taking out of a policy consented to additional insurance is admissible on the question of waiver. *Connecticut Fire Insurance Company v. Moore* ..... 19
2. Agent—Evidence—Admission.—Proof of knowledge of an insurance agent authorized to solicit insurance and issue policies of additional insurance may be shown by proof of his admission of knowledge made during the continuance of the agency. *Id.* .. ..... 19



## INSURANCE, LIFE—

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1. **Loan Upon Policy—Mistake—Cancellation of Premium Receipt and Note.**—An insurance company agreeing to lend the insured the reserve upon his policy upon the pledge of the policy, and accepting a note pledging the policy and executing a premium receipt by mistake when all the beneficiaries of the policy had not signed the note pledging the policy, may have the premium receipt and note canceled upon discovering the mistake if no change has been made in the meantime in the status of the parties, and the offer to rescind is promptly made, the insured falling on demand to have the note signed by the beneficiaries. *Huffaker's Exr., et al. v. Michigan Mutual Insurance Company*..... 56
2. **Contract—Liability—Want of Consideration for Note of Premium.**—The application for a policy of insurance providing that no contract of insurance shall be deemed made, and no liability on the part of the company shall arise until the policy is issued and delivered to the insured in good health, no liability for the premium exists where the insured refuses to accept the policy when tendered to him, the contract of insurance never having become binding; and there is no consideration for a note executed by the insured for the premium. *Citizens' National Life Insurance Company v. Murphy* 88
3. **Agreement to Accept Policy—When Not Binding.**—An agreement in the application by the insured to accept the policy if issued, being based on no consideration is not binding and he may withdraw his proposition at any time before the contract is closed. *Id.* ..... 88
4. **Evidence as to Health of Member of Benefit Society.**—The evidence being conflicting as to whether the member was in good health when he was reinstated, the question is for the jury. *Brackett v. Modern Brotherhood of America*..... 340
5. **Mutual Benefit Societies—Action to Recover in Excess of Sum Paid Beneficiary—Tender—Necessity For.**—Where a mutual benefit society pays to a beneficiary a certain sum which it admits was due under the policy, no tender of the sum so paid is necessary in order to enable the beneficiary to sue for the balance alleged to be due under the contract. *American Patriots v. Cavanaugh* ..... 653
6. **Failure to Attach By-Laws to Policy—Statutory Provision—Effect.**—A certificate of insurance issued by a fraternal benefit society in the year 1904 is governed by the provisions of section 679, Kentucky Statutes, 1903, requiring the by-laws of the mutual benefit society to be attached to and made a part of the certificate, and not by the amendment of 1906, exempting fraternal societies from the operation of the statute. *Id.* - - ..... 653

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7. Fraternal—Constitution and By-laws Not Attached to Certificate—Liability Under Certificate.—Where the constitution and by-laws of a fraternal benefit society are not attached to the certificate of insurance, as required by section 679, Kentucky Statutes, 1903, and cannot, therefore, be received in evidence or considered a part of the contract, a certificate of insurance providing that the members shall be entitled "to participate in the benefit fund of the National Fraternal Union, in the sum of not to exceed \$1,000, payable in case of his death to his wife, Elmira Cavanaugh, as now or may hereafter be provided for in the constitution and laws of the order," is a contract of insurance for \$1,000. Id. .... 653
8. Fraternal—Compromise—Fraud—Evidence.—Where the beneficiary in a certificate of insurance accepted less than was due under the certificate, and sued to recover the balance on the ground that the alleged settlement was obtained by fraud, evidence examined, and held to justify a submission of the question to the jury. Id. .... 654

INTEREST—See Action, 1.

## INTEREST BEARING WARRANTS—

The rule laid down in *Rhea v. Newman*, 153 Ky., 604, as to the issuance of interest bearing warrants, when there were already outstanding such warrants beyond the amount of \$500,000 over and above the cash in the treasury, is approved. *Bosworth, Auditor v. State University, et al.* ..... 370

INTERSTATE COMMERCE—See Intoxicating Liquors.

## INTOXICATING LIQUORS—See Licenses; Local Option; Criminal Law—

1. Licenses.—A municipality may, by ordinance enacted under statutory authority, not only make it unlawful for one to sell intoxicating liquors on Sundays, election days, or holidays, but may restrict the sale to certain hours of the day time, or require saloons to be closed during the hours of the night. *Cassidy, et al. v. Drake*..... 25
2. Construction of Act of 1912—Not Unlawful to Purchase or Procure at Place Where Liquor May Be Sold.—The act of 1912 making it unlawful to purchase or procure intoxicating liquors as the agent of the seller or buyer, refers to the purchase or procurement of it in prohibited territory. *Calhoun v. Commonwealth* .. .. 70
3. Purchase or Procurement by Agent of Buyer.—A citizen living in local option territory may send by his agent to a place where liquor is legally sold and get it for his personal use

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- if the agent acts without compensation and has no interest in the liquor. Id. .... 70
4. Unlawful to Purchase or Procure Through Agent in Local Option Territory.—Under the act of 1912, it is unlawful for any person to purchase or procure for another as the agent of the seller or buyer intoxicating liquors in territory where the sale of such liquors has been prohibited. Id. .... 70
5. One Employed in Bottling House Not Engaged in Manufacture of Whiskey.—A person who is employed at a bottling house bottling whisky in bond under the supervision of the United States government which was made four years before is not engaged in the manufacture of whiskey as a beverage. *Bracket v. Modern Brotherhood of America*..... 340
6. Unlawful for Carrier to Deliver Interstate Shipment in Local Option Territory.—A carrier that brings into or delivers in local option territory intoxicating liquor as an intrastate shipment violates section 2569-a of the Kentucky Statutes, and may be punished thereunder. *Adams Express Company v. Commonwealth* .. 462
7. When Unlawful for Carrier to Deliver as an Interstate Shipment in Local Option Territory.—Since the enactment of the Congressional legislation known as the Webb-Kenyon Law, a carrier brings into and delivers in local option territory an interstate shipment of liquor may be punished under section 2569-a of the Kentucky Statutes, if the whiskey is intended by any person interested therein, to be received, possessed, sold or in any manner used in violation of the law in force at the place of delivery, but if the liquor was not intended to be so used, then the carrier cannot be punished. Id. .... 462
8. Webb-Kenyon Law—Purpose and Effect of.—The purpose of the Act of Congress known as the Webb-Kenyon Law was to withdraw from interstate shipments of liquor the protection theretofore afforded by the commerce clause of the Federal Constitution as to such shipments of whiskey as are intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the law at the place where it is delivered to the consignee. But if the liquor is not intended to be so received, possessed or used, then the Webb-Kenyon Law is not applicable to the transaction and the carrier will be protected by the commerce clause. Id. .... 462
9. When Carrier of Interstate Shipment Protected by Commerce Clause of Federal Constitution.—A carrier of interstate shipment of intoxicating liquor cannot be punished under any statute of the State unless the liquor was intended to be received or used in violation of some law of the State in force at the place of delivery. Id. .... 462
10. Personal Use—Possession for Such Use Not Unlawful.—It is not unlawful for a person to purchase for his own use, at places where it may be lawfully sold, intoxicating liquor,

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or have such liquor in his possession for such use, and a carrier who delivers to a person for his personal use an interstate shipment of liquor that was purchased at the place of shipment does not violate any law of this State. *Id.* ..... 462

11. Purchase of by Agents of Foreign Liquor Dealers—Regulation.—While the power exists in the State to regulate the business of soliciting proposals to purchase intoxicating liquors by agents of foreign liquor dealers, this State as yet has not legislated on this subject. (See 153 Ky., 784). *Martin v. Commonwealth* .. .. . 462
12. Indictments Against Carrier for Delivering in Violation of Law.—If the State law prohibits the thing the carrier has done, the indictment should charge in appropriate words a violation of the State law under which the prosecution is instituted, and then if the Webb-Kenyon Act is applicable to the transaction when treated as an interstate shipment, a conviction may be had upon sufficient evidence that the State law has been violated. *Id.* ..... 463
13. Validity of Section 2569-a of Kentucky Statutes.—This section is valid in every state of case when applied to intrastate shipments, but is invalid when applied to interstate shipments, unless the interstate shipment is intended to be received or used in violation of some law of the State. *Id.*..... 463
14. Where facts are shown from which the jury may infer that the defendant sold the whiskey to the witness, a conviction will be sustained, although the defendant, himself, testified that he did not sell it, and had no interest in it. *Salings v. Commonwealth* .. .. . 738
15. Instructions.—An instruction telling the jury that if they believe from the evidence beyond a reasonable doubt that the transaction detailed by the witnesses was a scheme or device to evade the local option law, was not misleading or improper. *Id.* .. .. . 738
16. Local Option Law—Place of Sale—Evidence—Peremptory Instruction.—Where the purchaser of whiskey gives, in local option territory, to the member of a firm engaged in business where the local option law is not in force, an order to send him a gallon of whiskey, the sale takes place at the point where the whiskey is delivered to the express company, and not at the place where it is delivered by the express company to the purchaser, in the absence of any understanding or agreement between the seller and the purchaser that the whiskey is not to be paid for until actually delivered to the purchaser, in which event the sale takes place at the point where delivery is made by the express company, and if such delivery be made in local option territory, the seller is liable under the local option act. *Josselson v. Commonwealth*..... 795

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17. Act of 1912—Instructions.—The Act of 1912, making it unlawful to purchase or procure intoxicating liquors as the agent of the seller or buyer, refers to the purchase or procurement of it in prohibited territory. Id. .... 796

JEOPARDY—See Criminal Law, 8-9.

JUDGMENT—See Appeal; Criminal Law, 5; Married Women; Verdict; Executors; Finding of Chancellor—

1. Non Obstante Verdicto—Not Allowed After Motion for a Peremptory Which Should Have Been Sustained.—A party is not entitled to a judgment non obstante verdicto where at the conclusion of the evidence he moves for a peremptory instruction and his motion should have been sustained. Connecticut Fire Insurance Company v. Moore ..... 19
2. Vacation of—New Trial.—A judgment will not be vacated or a new trial granted after the term at which it was rendered, except upon the grounds, or some of them, provided by section 518, Civil Code, and where a petition for the vacation of such judgment and new trial and the record of the action in which the judgment was rendered made a part of the petition, show that the petitioner was duly summoned in the first action and had ample opportunity to make defense, the judgment will not be set aside or a new trial granted upon the mere allegation that the debts sued on had been paid before the judgment was rendered; there being no fraud alleged in the procurement of the judgment. Beasley, et al. v. Furr .. . 286
3. Petition for Vacation of—Conclusion of Pleader.—The allegation that the petitioner did not discover that the judgment had been rendered until after the term at which it was entered, and that he could not by reasonable diligence have sooner discovered the fact, is a mere conclusion of the pleader, and is disproved by the admissions of the petition and the record in the former action; therefore, a demurrer to the petition was properly sustained. Id. .... 287
4. Former Conviction.—A plea of former acquittal or conviction will avail as a bar whenever the facts charged in the second indictment would, if proved, have prevented a legal conviction upon the prior indictment under which the prisoner has been acquitted or convicted. Louisville & Nashville Railroad Company v. Commonwealth ..... 294
5. Estoppel.—Where, in an action by a father against his children to quiet his title to a particular tract of land, the children claim under a deed from their father to their mother covering the land in controversy and also other lands, they may confine their answer and counterclaim to the land in controversy, and their failure to litigate with him the title to

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- another tract of land, though embraced in their deed, does not preclude them from thereafter asserting title thereto in another action by him wherein, for the first time, the title is called in question. *Newman v. Newman, et al.*..... 300
6. When Should Not Be Reversed—Instruction—Variance.—The defendant was charged with stealing the property of Stuart Robbins. The proof showed that the property belonged to Stewart Roberts. The court in his instructions used the two names interchangeably, the defendant not having been misled in any way, or prejudiced. Held, that the judgment should not be reversed. *Sutton v. Commonwealth*..... 799
7. When Will Not Be Reversed—Evidence.—The circuit court having ruled out certain improper questions asked a witness, a reversal will not be had where the witness simply failed to prove the facts, which the Commonwealth Attorney sought to show. *Id.* .. 799
8. Action to Enforce Collection of—Defense.—In an action to enforce collection of a judgment an answer by defendant denying that such a judgment as is sought to be enforced exists, is a good defense. *International Harvester Company v. Commonwealth* .. 838
9. Pleading—Defense.—An allegation that the judgment sought to be enforced was entered without service of process upon defendant or any officer or agent of defendant, presents a good defense. *Id.* ..... 838
10. Conclusiveness of.—A judgment of the lower court which has been affirmed by this court is conclusively binding upon the parties. *Stratton & Terstegge Company v. Meriwether*... 840
11. Construction of.—Judgments should be reasonably construed and enforced so as to carry out the spirit as well as the letter of the judgment. *Id.* ..... 840

JUDICIAL NOTICE—See Evidence, 10.

JUDICIAL SALES—See Executors and Administrators; Vendor and Purchaser—

1. If a judicial sale as made was authorized under any one section of the Code, it is a valid sale, although the parties may through caution or carelessness, also have attempted to join other or additional unauthorized grounds for the sale. *Caulder, et al. v. Chenault's Executor*..... 777
2. Sale of Land for Re-Investment—Jurisdiction.—Where the mother owned absolutely an undivided interest in a farm, and the remaining interest therein was owned by her children subject to the mother's right of dower and said farm was indivisible, and it was shown to be to the interest of all the parties to sell it and re-invest the proceeds in other land, the circuit court had jurisdiction under section 491 of the Civil Code to order a sale for that purpose. *Id.*..... 777

**JURISDICTION**—See Appeal; Land, 14; Judicial Sales; Larceny.

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**JURY**—See Criminal Law; Homicide; Trial; Verdict—

1. Grand and Petit Jurors—How Obtained—Action of Trial Court Directing Sheriff to Summon Bystanders—Exhaustion of Regular Panel.—The action of the trial court in directing the sheriff to summon bystanders, after the regular panel had been exhausted is expressly permitted by section 2247 of the Kentucky Statutes. That section seems to give the trial court the discretion either to draw the names from the drum or wheel case, or direct the summoning of bystanders. *Thurman v. Commonwealth* ..... 555
2. Alleged Misconduct of Juror.—Where a statement of a juror was merely an expression of disapproval at appellant's course in changing his testimony at the second trial, it cannot be said to indicate that he had made up his mind as to appellant's guilt. (For former opinion, see 152 Ky., 791). *Elliott v. Commonwealth* .. . 696

**LACHES**—See *Lis Pendens*; Specific Performance.

**LAND**—See Dower; Homestead; Partition; Executors and Administrators; Judicial Sales—

1. Action to Quiet Title—Deed—Lands Covered By—Evidence.—In an action by the father against his children to quiet title to a tract of land, evidence examined, and held that a deed, which the father made to his wife, covered the land in controversy. *Newman v. Newman, et al.* ..... 300
2. Action for Trespass—Pleading.—When the petition avers that the plaintiff is the owner of the tract of land in controversy and the defendant by his answer denies this, and alleges that he is the owner of the land, the affirmative matter in the answer is only an affirmative traverse of the allegations of the petition and no reply is necessary. *Higdon v. Wayne County Security Company* ..... 337
3. Issue as to Title—When Transfer to Equity Improperly Made.—The issue as to the title to the land being an ordinary issue on which the other issues in the action depended, the circuit court improperly transferred the action to the equity docket, thus denying to the defendant a trial by jury. *Id.* ..... 337
4. Adverse Possession—Evidence.—In an action involving title to timber on certain lands, evidence of adverse possession by the defendants' grantors examined, and held sufficient to take the case to the jury, and to sustain a verdict in favor of the defendants. *Kentucky Coal and Timber Development Company v. Carroll Hardwood Lumber Company, et al.* ..... 523
5. Adverse Possession—Instruction.—In an action involving title to timber on certain lands, instructions examined and held properly to present the question of adverse possession. *Id.* ..... 523

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6. Timber—Severance—Title—Parol Evidence—Pleading.—Where a contract for the sale of timber is silent as to its severance from the soil and the time of removal, parol evidence of the intention of the parties is admissible without a plea of forfeiture. *Id.* ..... 523
7. Timber—Severance—Title.—Where a contract for the sale of timber is silent as to its severance from the soil, the intention of the parties may be shown by parol evidence, and if it appears from the situation of the parties and from the circumstances surrounding them that a severance of the timber from the soil was contemplated at the time of the execution of the contract, the title of the vendee will be defeated unless he cuts and removes the timber from the land within a reasonable time, and a delay of fourteen years will, as a matter of law, work a forfeiture of the title. *Id.*..... 523
8. Timber—Severance—Time for Removal.—Where a contract for the sale of timber is silent as to its severance and time for removal, but the parties agree that the vendee is not to cut and remove the timber until a certain land company begins to operate in that vicinity, the vendee has a reasonable time thereafter within which to cut and remove the timber from the land. *Id.*..... 523
9. Timber—Severance—Title—Instruction.—Where in an action involving the title to timber, defendants claim the title by virtue of a deed executed fourteen years prior to the bringing of the action, it was error to assume in the instructions that the defendants had title, when there was evidence tending to show that at the time of the execution of the deed a severance of the timber from the soil was contemplated by the parties, and that the defendants had failed to cut and remove it within a reasonable time. *Id.* ..... 523
10. Title—Adverse Possession—Evidence.—Where plaintiff relies on certain patents and defendants rely on the adverse possession of a remote grantor, it was not error to direct a verdict in favor of plaintiff as to the land covered by his patents, when the evidence failed to show that the defendants' grantor marked out a boundary and entered upon the lands covered by the patents prior either to the time that the patents were issued or the surveys made. *Id.*..... 523
11. Excluded by the Petition—Peremptory Instruction—Error.—It is error to direct a verdict in favor of plaintiff for lands excluded by the petition. *Id.*..... 524
12. Patents—Location—Evidence.—Where the evidence of the location of certain old patents is so vague, indefinite and uncertain as to make their location a matter of mere guess work, it is not error to refuse to submit to the jury the question of their location. *Id.* ..... 524
13. Condemnation Proceeding—County Court Without Jurisdiction to Try Title.—In a proceeding in the county court to condemn



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land for a railroad right of way, answer having been filed by each claimant asserting sole ownership in the land, and denying title in the other, and a jury has assessed the damages for the right of way, the county court undertook to determine the rights of the adverse claimants of the land to the fund and to dispose of it as those rights might appear to that court, when appellant filed in the circuit court a petition for a writ prohibiting the county court from trying the issue as to title, and asking a transfer of the action to the circuit court. Held, the county court being without jurisdiction to try the question of title, the writ should have been granted, and it was error to sustain a demurrer to the petition. *Dickerson v. Wm. Goocey*, County Judge ..... 685

14. County Court Without Jurisdiction to Try Title—Transfer to Circuit Court.—Except in the matter of land partition and condemnation the statutes confer no jurisdiction upon the county court that relates directly to land, and in partition and condemnation it is clear that the county court jurisdiction does not go to the title of the land involved. Upon motion of either party the county court should have transferred to the circuit court this cause when the damages were assessed in order that the circuit court might try the question of title and dispose of the fund accordingly. *Id.* ..... 686
15. Parol Purchase—Rent.—Where one takes possession of land under a parol purchase of same, although he cannot defeat an action for its recovery by the holder of the legal title, or enforce a specific performance, he has a resisting equity, which entitles him to a lien upon the land for the consideration paid for it and the enhanced value given the land by such lasting and valuable improvements as, he may, in good faith, have put upon it, but is chargeable with rent during his occupancy thereof. *Coffey, et al. v. Humble, et al.* ..... 708
16. Rent—How Regulated.—In adjusting the rights of the parties under the above rule, the correct rule as to the quantum of rents is that they should be regulated by the interest on the consideration and on the value of the improvements, being neither greater nor less than their united amount. *Id.* ..... 708

## LARCENY—See Indictment—

1. Horse Stealing—Verdict.—Proof showing that the defendant was present when the horse was stolen and carried away; that he assisted in disposing of the property, and claimed a half interest in the horse, a verdict finding him guilty, will not be disturbed, his own explanation of the circumstances not being satisfactory. *Johnson v. Commonwealth.* ..... 742
2. Horse Stealing—Carrying to Another County.—If a horse is stolen in one county and carried to another, the thief may be prosecuted in either county for larceny, as there is a new

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- asportation in each county to which the stolen property is carried. *Id.* ..... 742
3. Evidence of—Competency.—When the defendant, has in his possession soon after the theft a large sum of money, when he had none before, this is a competent fact, though the money he so had is not identified with that stolen. *Davis v. Commonwealth* ..... 774
4. Taking and Carrying Away Different Articles at Different Times—Instructions.—While two larcenies cannot be added together so as to sustain the charge of grand larceny the evidence connects appellant with taking two automobile tires worth \$40 apiece, and whether he made one or two trips for them he was guilty in either event. For these reasons the objection to the instruction is not well taken. The instruction directing his conviction if the jury believed he “unlawfully and feloniously, took, stole and carried away the various articles enumerated in the indictment of the aggregate value of \$105, or of any of said property of the value of \$20 or more.” *Woodford v. Commonwealth*..... 818

**LEGISLATIVE ACT**—See Railroads; Commission Form of Government Act.

**LESSOR AND LESSEE**—See Contracts.

**LETTERS—PROOF OF CONTENTS**—See Evidence.

**LICENSEES**—See Railroads.

**LICENSES**—See Intoxicating Liquors; Taxation—

1. Revocation of.—A municipality may make it a condition in granting a liquor license, that it shall be revoked by the Mayor if the licensee shall be convicted of violating the ordinance by keeping his saloon open on Sunday. *Cassidy, et al. v. Drake.* ..... 25
2. Revocation of—Ministerial Duty.—Where a municipal ordinance provided that a liquor license should be revoked by the Mayor upon a conviction of the licensee for selling liquor on Sunday, the Mayor performed a mere ministerial duty in revoking the license, and it was not necessary for him to give the licensee notice, or a hearing, before the license could be revoked. *Id.* ..... 25
3. Revocation of on Conviction of Bar Tender.—Where a bar tender appeared in person at the city clerk's office and represented to the clerk that he was the owner of the saloon, and received the license, signing for it in the name of the owner, and executed a bond in the name of the owner, without dis-

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closing the fact that he was the bar tender, and a different person, the conviction of the bar tender for selling liquor on Sunday is sufficient to authorize a revocation of the license which had been taken by the bar tender in the name of the real owner. *Id.* ..... 25

LIENS—See Animals; Vendor and Purchaser; Mortgages.

LIMITATION—See Adverse Possession; Damages; Partition; Venue—

1. Adverse Possession—Notice—Tenancy in Common.—To set the statute of limitations in motion in favor of one cotenant against another, actual notice of adverse holding or such open and notorious claim of ownership or exercise of such claim of right as to justify the inference of adverse possession, must be brought home to the disseized cotenant. *Wilson v. Hoover, et al.* ..... 1
2. Statutes of Have No Extra-Territorial Force.—Statutes of Limitation are of State regulation and are founded on State policy. Such statutes have no extra-territorial force or operation for which reason foreign jurisdictions are not bound by them; hence the doctrine in respect to the limitation of actions is that the law of the forum governs; and this is true whether the action is *ex contractu* or *ex delicto*. *Louisville & Nashville Railroad Company v. Burkhart* ..... 93
3. Period of in Kentucky and Indiana—Action for Personal Injuries.—Although a general law of the State of Indiana fixes two years as the period of limitation for the bringing of an action to recover damages for a personal injury sustained in that State, as in Kentucky the period of limitation as to such an action is one year, in order to enable the plaintiff to recover in the latter State for a personal injury sustained in Indiana, he must bring the action within the year next after the injury was received. *Id.* ..... 93
4. Statutes—Construction — Coverture. — The Weissinger Act (Secs. 2127-2128 Ky. Stats.), did not remove that disability of coverture which prevents the running of the statutes of limitation against one under the disability of coverture. *Smith's Exr., et al. v. Johns* ..... 275
5. Accrual of Cause of Action.—An action by the wife against the estate of her husband for an accounting of rents received by him from her separate estate does not accrue until his death. *Id.* ..... 275
6. Payment of Mortgage.—The claim of one discharging a mortgage without taking an assignment is barred by the five year statute of limitations. *Letton's Admr., et al. v. Rafferty, et al.* 278

## LIS PENDENS—

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1. Vendor and Purchaser.—A lis pendens purchaser from one who is a party to the action, and who has been divested of title by the judgment entered, acquires no title, and where his vendor, for a period of nearly twenty years, contests the action without raising the plea of fraud, the lis pendens purchaser is precluded by the judgment, and cannot attack the judgment and the subsequent proceedings on the ground of fraud. *Roberts v. Cardwell* ..... 483
2. Laches—Adverse Possession.—Though a purchaser pendente lite is bound by any judgment that may be rendered against the person from whom he purchased, yet where there is an unreasonable delay in the prosecution of the suit, a party may lose the benefit of the lis pendens and deprive himself of any remedy against a bona fide purchaser, and such purchaser may rely upon the statute of limitations. *Id.* ..... 483

LIVE STOCK—See Carriers; Animals.

LOANS—See Insurance, Life.

LOCAL OPTION—See Intoxicating Liquors; Criminal Law; Venue.

## LOCAL OPTION ELECTION—

1. County—Petition—Sufficiency.—When a local option election is sought in an entire county, the petition should be signed by a number of voters equal to 25 per cent of the votes cast in each of the precincts at the last preceding general election. *Gover, et al. v. Newton, et al.* ..... 479
2. Precinct—Transfer of Territory and Population—Petition—Requisite Number of Signers.—Where after the next preceding general election a new county is formed and a portion of the territory and population in a precinct in an old county is transferred to the new county, it is only necessary that the petition asking for a local option election in the old county be signed by a number of voters in the precinct equal to 25 per cent of those who voted at the next preceding general election, and still remain in the precinct. *Id.* ..... 479
3. Petition—Right of Petitioners to Withdraw Their Names.—Persons who sign a petition for a local option election may withdraw their names from the petition at any time before it is acted on by the county court. *Id.* ..... 479
4. Submission of Case—Subsequent Hearing of Evidence—Right of Petitioner to Withdraw.—Where on petition for the calling of a local option election the case is submitted, the hearing of evidence thereafter on a disputed question of fact renders ineffective the order of submission, and does not deprive a petitioner of the right to withdraw his name from the petition before it is finally acted on. *Id.* ..... 480

LOOKOUT DUTY—See Railroads.

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## MALICIOUS PROSECUTION—

1. Evidence—Failure of Proof—Peremptory.—Where in an action for malicious prosecution it appears that plaintiff has been prosecuted by defendant on several charges of breach of the peace, and there is nothing in plaintiff's evidence to show that it relates to the prosecution for which damages are sought, there is a failure of proof and a peremptory instruction in favor of the defendant is proper. *Holtman v. Bullock*. 634
2. Evidence—Record of Another Prosecution—Not Receivable.—In an action for damages for malicious prosecution, the record of a prosecution different from that for which damages are sought, was properly excluded. *Id.* ..... 634

## MANDAMUS—

Public Records—Inspection.—A citizen and taxpayer of a city of the first class, having an interest in the records of the city engineer's office, has a right to inspect them under reasonable terms and conditions, and where he is refused this right, mandamus will lie, even though the inspection is desired for purposes of a pending suit against the city. *Barrickman v. Lyman, City Engineer, et al.* ..... 630

MANSLAUGHTER—See Homicide.

MARRIAGE—See Criminal Law, 11.

## MARRIED WOMEN—

Personal Judgment Against—When May Be Rendered—Rights of Married Women.—A personal judgment may properly be rendered against a married woman whether sued jointly with her husband or singly, if the obligation be one for which she is individually liable otherwise than as a surety. Since the adoption of section 2128, Kentucky Statutes, a married woman has every right to acquire, hold and dispose of property, real or personal, and to contract, sue and be sued, possessed by the husband, "except that she may not make any executory contract to sell or convey, or mortgage her real estate, unless her husband join in such contract;" nor can she become a surety. *Fain, et al. v. Heathman, et al.* ..... 174

MASTER AND SERVANT—See Mines and Mining—

1. Personal Injury—Approximate Cause—Evidence — Peremptory —Where a servant was injured by a hand car moved by another servant of the master, pursuant to an order of the foreman, the evidence examined and held that the question of whether or not the giving of the order was the approxi-

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- mate cause of plaintiff's injury is for the jury. *Chesapeake & Ohio Railway Company v. Laney*..... 39
2. Negligence of Superior—When Master Liable.—A servant cannot recover of the master for the negligence of a superior in the same department, unless the negligence be gross. *Id.*.... 39
3. Blasting—Injury to Servant—When Master Not Liable—Ordinary Care.—When due notice is given of an intended blast, and the servant understanding the danger, undertakes to protest himself, the master is not responsible if the servant is injured by reason of his own want of precaution, it not appearing that the master saw his danger and could have averted it by ordinary care. *Corley's Admx. v. Green-Marks Concrete Company* ..... 45
4. Action for Damages—Former Opinion—Evidence Supplied—Negligence.—In an action by a servant for damages the judgment awarding damages was reversed upon a former appeal for failure of evidence, but upon the present appeal the evidence pointed out was supplied, there is no error in the instructions and the judgment complained of was properly rendered. *Green v. Burns*..... 99
5. Rule as to Discharge of Employees—Unwritten Rule—Absence of Notice to Employee—Instructions.—While the former opinion indicated that there should have been an instruction as to the existence of a rule which authorized the discharge of employees who were habitually garnished, the nature of the instruction was not indicated, and for this reason the question will not be deemed to have been settled in that opinion. It would be unfair for a company to have unwritten or secret rules under which an employee might be discharged without notice, and the idea expressed in the instruction given has been approved by this court. (See 107 Ky., 233). *Louisville & Nashville Railroad Company v. Cox*..... 100
6. Evidence Upon Another Trial.—Upon another trial appellant may prove any fact connected with appellee's use of the ladder that may tend to show his knowledge of its defective condition before or when the injury was received. *East Tennessee Telephone Company v. Jeffries*..... 257
7. Evidence—Instructions.—In addition to the instructions set out in the opinion, the jury should be directed to find for defendant unless they believe from the evidence the ladder broke or by reason of its defective condition came apart. *Id.* - - - ..... 257
8. Order of Superior—Effect of—Contributory Negligence.—Where a wrecking crew bound for a wreck two and one-half miles distant is composed of twenty-five or thirty men, and it is necessary for some of them to find places on the engine elsewhere than in the cab, an order by the foreman in charge to "ride the engine" authorizes one of their number to make a

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- choice between riding alone on the cross-beam of the pilot or riding with others on the coal on the tender, also a position of danger, and therefore to take a position on the cross-beam, unless such position was so obviously dangerous that an ordinarily prudent person would have refused to take it. *Illinois Central Railroad Company v. Carter*..... 373
9. Dangerous Place—Order of Superior—Obvious Danger.—Where the engineer of an engine bound for a wreck has been informed of the wreck and knows where it is, and the wreck is only two and one-half miles distant and the track between the engine and the wreck is closed, and no other collision is to be anticipated, it cannot be said as a matter of law that the position of one who, in obedience to the order of the foreman in charge to "ride the engine," securely fixes himself on the crossbeam of the pilot in preference to riding with other employees on the coal on the tender, is so obviously dangerous that a person of ordinary prudence would have refused to take it. *Id.* ..... 374
10. Injury to Servant While Engaged in Tearing Down Old Building—Duty of Inspection.—The law does not impose upon the master engaged in the hasardous work of tearing down an old building the duty of inspecting it so that his workmen may have a safe place to work, and in an action by a servant who was injured from the breaking of a beam upon which he was standing while engaged in tearing down an old building, it would be requiring too high a degree of care to say that it was the duty of the master to have known that there was a knot in the particular piece of timber, or that the knot ran through the timber at such an angle as to make it dangerous to his workmen. *Standard Oil Company of Kentucky v. Watson.* ..... 550
11. Injury to Servant Caused from Defective Beam in Building.—While, if the master knew the piece of timber was defective it was his duty to warn him of the defect, but there is no evidence of such knowledge, and it would be unreasonable to require a master to examine every timber in an old house that was being torn down. *Id.*..... 550
12. Action by Servant for Personal Injury—Evidence—Peremptory Instruction.—In order to hold appellant liable for damages, it would be necessary to show that the foreman knew of the knot in the plank, and that it ran through at such an angle as to make it dangerous, and that he had not warned appellee of these facts. There being no evidence of such knowledge on the part of the master, the peremptory instruction asked should not have been given. *Id.*..... 550
13. Injury to Servant by Explosion.—In an action by a servant against the master for injuries received by the explosion of a metal cap while at work receiving and disposing of refuse

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and debris from a tunnel, the master knowing the refuse was likely to have in it one or more caps or exploders, a thing inherently dangerous, it was his duty to warn the servant of the danger, and this is true even if the master was not responsible for the presence of the caps, and by the exercise of utmost care could not have kept them out. Appellee testified that he did not know of the presence of the cap, or of the probability that it would be hauled out with the muck, and that he had never been warned of such danger. He had only been at work a short time, his story is not unreasonable and the jury had a right to believe him. While there was a conflict upon this point, there is no ground for appellant's request for a peremptory instruction. *Thrasher & Gunther v. Emke*..... 744

14. Injury to Servant by Explosion—Instruction—Negligence.—It is sufficient if the employers knew, or by the exercise of ordinary care could have known of the danger of caps or exploders getting into the refuse, and negligently failed to keep them out, or if the servant was ignorant of the danger, and by the exercise of ordinary care could not have discovered it, and appellants failed to warn him. The contention that the court in its instructions failed to require the jury, as a prerequisite for finding for plaintiff to believe he knew, or could by the exercise of ordinary care have known of the presence of the explosion is not the question here. *Id.*..... 745
15. Negligence—Instructions.—The question of appellants' negligence in permitting the caps to be in the muck, and of appellee's knowledge of the danger were fairly submitted to the jury. *Id.* .. 745

MEASURE OF DAMAGES—See Contracts; Carriers; Trial, 7.

MENTAL CAPACITY—See Evidence.

MINES AND MINING—See Contracts, 16-21—

1. Props—Where to be Furnished—Duty of Mine Owner—Subsection 7 of Section 2739-b, Ky. Statutes.—It is the duty of the mine owner to furnish props at the place where the miner is at work. *New Bell Jellico Coal Company v. Sowders*..... 101
2. Props—Negligent or Willful Failure to Furnish—Action for Damages—Subsection 7 of Section 2739-b, Ky. Statutes.—In a civil action for damages a person injured may recover of the mine owner for either a negligent or willful failure to furnish props as required by subsection 7 of section 2739-b, Ky. Statutes. *Id.* .. 102
3. Instructions.—Where the mine owner fails to furnish props but the miner nevertheless continues at work, an instruction telling the jury to find against the plaintiff on that account unless they believed from the evidence that the defective



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- roof in the mine and the dangers therefrom were so obvious as that none but the reckless would have remained therein and proceeded to work thereunder, is erroneous and prejudicial. The correct rule is that the owner is still liable, unless the danger from the lack of props is not only imminent, but so obvious that an ordinarily careful man would not have worked under the circumstances. *Id.*..... 102
4. It is the duty of mine owners to exercise ordinary care to keep the entries used by the miners in reasonably safe condition, and if a miner, while in the line of his employment, is injured by the failure of the owner to perform this duty, he may recover damages. *Jellico Coal Mining Company v. Woods* .. 683

MISTAKE—See Insurance, Life, 1; Action, 7.

MORTGAGES—See Limitation; Sureties—

1. Payment by Third Party Without Assignment—Lien.—One who pays off a mortgage without taking an assignment requires no lien. *Letton's Admr., et al. v. Rafferty, et al.*..... 278
2. Executed by Married Woman to Secure Debt of Husband.—A mortgage executed by a married woman to secure a debt of her husband, will not be adjudged unenforceable on the ground that it was procured by fraud, coercion or duress, when the mortgage was executed intelligently three days after the transactions in which it was charged that the coercion was exercised, and no claim of coercion was made until after the mortgage had passed into the hands of a purchaser with the acquiescence of the married woman in its validity. *Madrox v. Rowe, Assignee*..... 417

MOOT QUESTION—See Appeal, 12.

MUNICIPAL CORPORATIONS—See Intoxicating Liquors; Licenses—Commission Form of Government Act; Streets—

1. Ordinance—When Void.—An ordinance passed by a municipality cannot be invalid upon any other ground than its illegality. It is not within the province of the court to say that a valid ordinance is unwise or impolitic; those questions must be addressed solely to the General Council. *Gathright, et al. v. H. M. Bylesby & Company, et al.*..... 106
2. Ordinance—Discussion of.—It is not for the courts to say how much discussion the General Council should allow before adopting an ordinance, or that parliamentary rules of procedure should be applied otherwise than under the ordinary rules of such procedure. *Id.*..... 106

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3. Amendment of Ordinances.—Section 2777 of the Kentucky Statutes, which provides that no ordinance shall be altered or amended in any way except by repealing it, was intended to prevent loose legislation of doubtful meaning rather than to control parties in the exercise of their rights under existing ordinances. *Id.* ..... 106
4. Granting of New Franchise Upon Expiration of Original Franchise.—Where a gas franchise expires, and the city is required under section 3037-d of the Kentucky Statutes to sell a similar franchise, the owner of the expiring franchise is the only one that can complain if the city offers to sell a new franchise different from the one that has expired. *Id.*..... 106
5. Power to Contract as to Existing Franchise.—A municipality cannot, in the absence of express legislative authority, make contracts or pass by-laws which would cede away, control or embarrass its legislative or governmental powers, or which would disable it from performing its public duties; but this rule does not prevent the municipality from contracting with the owner of the franchise to waive a contract right. *Id.*..... 106
6. Power to contract.—Where, under the charter of a gas company, the city had the right to purchase the plant at the expiration of the charter, the city has the power to grant a new franchise and to postpone the purchase of the plant until the expiration of the new franchise. *Id.*..... 106
7. Power to Contract for Future Maximum Rates for Electricity.—Where a municipality expressly reserves the right to make reasonable regulations of rates for electricity, an ordinance which provides that the city will, in the future, pass an ordinance fixing maximum rates for electricity to which the owner of the franchise to furnish electricity agrees, the ordinance is not illegal upon the ground that it undertakes to commit the General Council, in advance, to certain maximum rates, since the General Council may, at any time, fix other rates provided they be reasonable. *Id.*..... 107
8. Contract—Public Policy.—The act of a municipality which has the sanction of law cannot be against public policy. *Id.*..... 107
9. Franchise to be Sold After "Due Advertisement."—Under section 164 of the Constitution, which provides that a municipality can only sell a franchise "after due advertisement" the court cannot question the good faith of the council in fixing the length of the advertisement at not less than two weeks and in two different newspapers. *Id.*..... 107
10. Sale of Franchise—Highest and Best Bidder.—Under section 164 of the Constitution, which requires all franchises granted by a municipality to be sold publicly to the highest and best bidder, an ordinance which is so drawn as to confine the bidding to one person is invalid. *Id.*..... 107
11. Sale of Franchise—Exclusive Bidder.—The mere fact, however, that one bidder has, by reason of his ownership of an

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- existing franchise, or his capital, an advantage over other bidders, does not make him an exclusive bidder within the rule above laid down. Id..... 107
12. Franchise May be Confined to Territory Already Occupied.—The fact that an ordinance for the sale of a gas or electric franchise is drawn so as to cover only territory already occupied by the pipes or wires of an existing company will not invalidate the ordinance. Id..... 107
13. May Waive Franchise Provision.—A provision in the franchise of an electric company prohibiting it from selling out to a competitor may be waived by an agreement between the owner of the franchise and the municipality that granted it. Id. . . . . 107
14. Waiver of Franchise—Exclusive Bidder.—Where the franchise of an electric company prohibited it from selling out to a competitor, and the municipality offered to sell a natural gas franchise, and agreed to waive the prohibition in favor of the competitor of the electric company in case it should buy the natural gas franchise, the ordinance offering the natural gas franchise for sale did not violate the rule against exclusiveness in public bidding, since the waiver merely put the competitor upon an equal footing with other bidders. Id..... 108
15. Maintenance of Water Works—When Customer Puts in Pipes for His Own Use—Action by for Loss—When Recovery May Be Had.—A city which maintains its own water works system must use ordinary care in maintaining its mains and pipes in proper condition, and a customer who uses the water putting in the pipes on his own property, must use ordinary care to keep them in condition. If a loss occurs where both the parties have been negligent the plaintiff cannot recover if the loss would not have occurred but for his negligence, unless the city after notice of the trouble failed to use ordinary care to avert the loss. Mann Brothers v. City of Henderson.... 154
16. Sewerage Commission of Louisville Distinct Corporation—Negligence of—City Not Liable for.—The sewerage commission of Louisville is a distinct and independent corporation, and the city is not liable for the negligence of the servants of the sewerage commission. City of Louisville v. Frank's Guardian . . . . . 254
17. Not Liable for Negligence of Servants in Discharge of Governmental Functions.—A city is not liable for the negligence of its servants in the discharge of its governmental functions. The sewerage commission discharges a governmental function. Id. . . . . 254
18. Streets—Duty of City in Respect to.—A city may leave its streets, in the condition in which they were when first established and set apart for public use, although they may then have been entirely unimproved, but if it undertakes to im-

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- prove them, it must exercise ordinary care to put and keep them in reasonably safe condition for public travel, having however a discretion as to the character and quality of the repairs or improvements that it may make, subject to the limitation that when completed the streets will be reasonably safe for public travel. *Gee's Admr. v. City of Hopkinsville*..... 263
19. Streets—Liability for Unsafe Places in.—Discretion as to Character of Repair.—A city is only guilty of actionable negligence when defects or unsafe places in a street that it constructs are the proximate cause of the injury complained of. If the street it constructs is reasonably safe, it is not to be made liable for the failure to adopt other methods of construction or the failure to do something that it might or might not do in its discretion. *Id.*..... 263
20. Bridges—Duty in Respect to Erection of as Part of Street.—A city is under no legal duty to construct a bridge across a river that runs through it, and therefore its failure to do so cannot be made the basis of an action for negligence, but when the city has erected a bridge, then it must exercise ordinary care to maintain it in reasonably safe condition for public travel. *Id.* ..... 203
21. Not Liable in Damages for Death of Person Drowned in River on Account of Failure to have a Bridge on a Street.—Where a river traversed a city, and the city had macadamized and put in reasonably safe condition for public travel a street on both sides of the river and to the center of the bed, it was not liable in damages for the death of a traveler who attempted to cross the river at the street in the nighttime, after a heavy rain had swelled the usually shallow stream into a dangerous current. *Id.* .. 263
22. Street Lights—Duty in Respect to.—A city is under no duty to light its streets. It may, if it chooses to do so, leave them unlighted, and cannot be made liable in damages to a traveler who is injured solely because of its failure to light them. *Id.* 263
23. Street Lights—Duty in Respect to.—Where there are no defects or unsafe places in the streets, and they are in a reasonably safe condition for public travel, the city has a broad discretion as to the number and character of the lights that it will establish. *Id.* ..... 263
24. Street Lights—Duty in Respect to.—In respect to the lighting of streets a city is, in no state of case, required to do more than furnish such lights as may be necessary to keep the character of streets that it has constructed in a reasonably safe condition for travel. It is not required to furnish lights to make safe that character of streets that it is under no duty to construct or maintain. *Id.*..... 264

MURDER—See Homicide.

MUTUAL BENEFIT INSURANCE—See Insurance, Life. Page

NEGLIGENCE—See Damages; Evidence, 5; Instructions; Municipal Corporations; Railroads; Master and Servant; Mines and Mining—

1. Damages—Injury to One Contractor by Negligence of Another.—The Louisville Commissioners of Sewerage are not answerable in damages for an injury to one contractor by the negligence of another contractor for the building of a sewer. *T. B. Jones & Co. v. Ferro Concrete Construction Company, et al.* ..... 47
2. Damages—Injury to Contractor Engaged in Public Work—Liability.—One contractor who injures another contractor by his negligence is liable therefor, in the case of a public work just as he would be in the case of a private work. *Id.* ..... 48

NEW TRIAL—See Appeal, 10; Judgment; Master and Servant; Verdict; Trial; Instructions, 8—

1. Absence of Counsel—Continuance.—The refusal of the circuit court to grant the defendant a new trial on the ground of the absence from the trial of counsel first employed by him, was not error, where there was no complaint of the absence of such counsel when or before the trial began, nor motion made for continuance because of their absence. *Clair v. Commonwealth* - - - ..... 711
2. Newly Discovered Evidence.—A new trial on the ground of newly discovered evidence was properly refused when it was apparent to the court from the record that the witnesses, by whom defendant claimed such evidence would be furnished, were in attendance at the trial, after being recognized at the previous term of court to appear and testify in his behalf. *Id.* 711
3. Homicide—Absence of Witnesses.—It was, however, error for the court to refuse the defendant a new trial on account of the absence of a witness, for whom an attachment had, at the previous term, been awarded because of his failure to attend court in obedience to a subpoena served upon him; it being made to appear, by the defendant's affidavit, that the testimony of such witness would have corroborated that of the defendant as to certain facts unknown to any other witness, which occurred immediately before the homicide and which conduced to prove that deceased would then have killed the defendant but for the interference of the witness. *Id.* ..... 712
4. Newly Discovered Evidence—Affidavit Unsupported.—A motion for a new trial on the ground of newly discovered evidence should be supported by the affidavit of the witnesses that they will so state, or by some other evidence than the affidavit of the defendant. *Woodford v. Commonwealth*..... 818

NEWLY DISCOVERED EVIDENCE—See New Trial. Page

NON-RESIDENCE—See Attachment; Process.

NOTES—See Bills and Notes.

NOTICE—See Banks; Limitation; Master and Servant, 5.

NUISANCE—See Bawdy House; Highways—

1. Police Regulations to Protect Health of Public—Unsanitary Dwellings—Proceeding in Police Court to Remedy Nuisance—Notice.—Under statutory authority to make all police regulations to secure and protect the health and safety of the public, and to define and suppress nuisances, the city may by ordinance provide that houses intended for dwelling purposes which are so unsanitary or out of repair as to be unfit for habitation or unsafe for occupation or dangerous to the public or injurious to the health or morals of the community, shall not be rented or leased, and to provide that the owner may be fined in a proceeding in the police court if he fails to remedy the nuisance within twenty days after notice so to do. *Polsgrove, Mayor, et al. v. Moss*..... 408
2. Ordinance Providing for Judicial Proceedings to Suppress.—A city ordinance providing for a judicial proceeding in a police court for the suppression of nuisances must be read in connection with the common-law rules governing judicial proceedings and will be construed as requiring the nuisance to be abated, not the structure to be removed, unless this is necessary to remedy the trouble. *Id.* ..... 409
3. Judgment of Police Court Abating—Appeal.—From a judgment of the police court abating a nuisance, an appeal will lie to the circuit court although the fine is less than \$25. *Id.* .. .. 409
4. May Be Prosecuted Under Common Law or Under Statute.—Any use of property which was at common law a nuisance, does not cease to be so because the same act is made an offense, by statute and a different punishment provided, and the party creating the nuisance may be prosecuted under either the common law or the statutory remedy. *Commonwealth v. Kentucky Distilleries & Warehouse Company, et al.* 787
5. Abatement of—Location of.—It is not necessary to specify the location of a nuisance further than to show that it is within the jurisdiction of the court, unless it is desired to obtain an order of abatement, or the locality is an essential ingredient of the offense. *Dave King and Edith King v. Commonwealth* .. .. 729
6. Abatement of—When Location Must Be Set Out.—Where the object desired by an indictment is an abatement of the nuisance, the location of the nuisance must be set out in the same manner as the place of a forcible entry, where restitution is to be awarded. *Id.*..... 729

OFFICERS—See Banks; Statutes; County Board of Health— Page

1. Contract With Under Authority of a Statute.—One who contracts with a public officer acting under the authority of a statute can contract only in the manner pointed out by the statute. *County Board of Education v. Dudley, et al.*..... 426
2. Officers—Powers of De Facto Officers Acting Under Unconstitutional Act.—State, county, district or municipal officers acting under authority of a legislative act are de facto officers, although the act may be declared unconstitutional and all acts done by such officers before the legislation creating the office has been declared invalid, are binding upon the public and third persons. *Wendt v. Berry, Trustee*..... 586
3. Officers—Powers of De Facto Officers of Municipal Corporations.—Where a city was created by an act of the Legislature, and a city government organized under the act, and contracts for street improvements made conformable to the general laws governing such a city, the contractor who made the improvements may enforce his claim against the property as fully as if the act creating the city was valid, although subsequent to the making of the improvement but before they were paid for the act creating the city was held to be unconstitutional. *Id.* ..... 587
4. Officers—De Facto Officers Defined.—A de facto officer is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office are exercised, first, without a known appointment or election but under such circumstances of reputation or acquiescence as are calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of an election or an appointment by or pursuant to an unconstitutional law before the same is adjudged to be such. *Id.*..... 587

OPINION—ON FORMER APPEAL—See Master and Servant, 4.

OPTIONS—See Vendor and Purchaser.

ORDINANCES—See Intoxicating Liquors; Municipal Corporations; Nuisances—

No Provision in Act Governing Third Class Cities to Test Validity of—When injunction to Restrain Enforcement Will Not Be Granted.—There being in the act governing cities of the third class no provision for testing the validity of an ordinance by suit in the circuit court, and no ground for equitable interference being shown by the petition, an injunction restraining the enforcement of the city ordinance will not be granted. *Polsgrove, Mayor, et al. v. Moss*..... 409

ORDINARY CARE—See Master and Servant.

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PAROL EVIDENCE—See Evidence.

PAROL PURCHASE—See Land, 15.

PARTIES—See Appeal—

1. Appearance.—One who files a demurrer to a petition and has an order entered controverting of record the allegation of the petition, enters his appearance. *Cotzhausen v. Barker*..... 624
2. Corporation—Evasion of Corporation Laws.—Where a corporation, for the purpose of evading the corporation laws of this State, turns over to its president certain livestock, with power to make contracts with reference thereto, neither the corporation nor the president can complain of the fact that the corporation is not made a party to action against the president to recover for their keep, where the latter did not ask that the corporation be made a party. *Id.*..... 624

PARTITION—See Homestead—

Action—Evidence—Weight and Sufficiency—Limitation of Actions—Adverse Possession—Tenancy In Common.—In an action for the partition of lands by a vendee of a cotenant against other cotenants or those holding under them evidence held sufficient to support the pleas of adverse possession and limitation of actions. *Willson v. Hoover, et al.*..... 1

PARTNERSHIP—

1. Creation—Evidence.—In an action for the settlement and accounting of a partnership between the surviving partner and the estate of his deceased partner evidence held to establish the existence of a partnership in each of two enterprises. *Marcum's Admr., et al. v. Marcum*..... 401
2. Interests—Evidence—Presumption.—In the absence of evidence showing the interest of partners in a joint enterprise, all partners will be presumed to have equal interests. *Id.*..... 401
3. Witnesses—Competency—Books of Account.—In an action for an accounting and settlement of a partnership, the surviving partner in possession of the firm's books is a competent witness to their authenticity. He may not, however, explain or testify as to entries made therein, unless the books were kept, and the entries made, by him. *Id.*..... 401
4. Witnesses—Competency—Checks.—In an action for an accounting and settlement of a partnership, the surviving partner is incompetent to testify as to transactions evidenced by checks issued by the deceased partner on the firm's bank account, as being an act done or omitted to be done by a deceased person. *Id.*..... 401



**PARTNERSHIP—Continued—**

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5. **Accounting—Evidence—Burden of Proof.**—In an action for an accounting and settlement of a partnership, where a partner kept the books of account of the firm and the books contained no entry or explanation of checks issued by him upon the firm's bank account, such checks will be presumed to be an appropriation of the partnership assets for the individual benefit of such partner, and the burden is upon him or his representatives to show the application of such funds to joint benefit. *Id.* ..... 401
6. **Accounting—Usury.**—In an action for an accounting and settlement of a partnership, the surviving partner should be credited with usury paid by him as a part of the partnership expense, if at the time he contracted to and did pay the usury, he, in so doing, acted in the utmost good faith toward the other partner. Such claims are not within the contemplation of section 3870, which requires claims against the estates of deceased persons to be purged of usury before suit. *Id.*..... 402
7. **Action For Accounting—Equity—Judgment.**—In an action for an accounting and settlement of partnership affairs, the correct practice is, where a dissolution of a partnership exists or is decreed, to direct a sale of all the firm's assets of whatever nature, unless a lawful agreement to distribute them in specie is assented to by the parties; and if, because of litigation with third parties over claims or rights growing out of the partnership, or for other valid reasons, disposition of every material issue involved must be deferred, such partial distribution of the cash on hand as would be justified by the record should be ordered; and thereafter, when the rights of all parties can be adjusted, final judgment should be entered. *Id.* .. - ..... 402

**PASSENGERS—See Carriers.****PASSWAYS—See Easements.****PATENTS—See Land.****PENALTIES—See Criminal Law.****PENSIONS—**

1. **Grant of to Confederate Soldiers—Public Services Rendered By.**—A state may grant a pension to Confederate soldiers for public services rendered by them to the State during the Civil war when the State officially declared that it would remain neutral during the war, and the services of the soldiers were rendered in an effort to maintain the sovereignty, and the rights of the State as declared in the State Constitution. *Bosworth, Auditor v. Harp* ..... 559

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2. Word "Appropriate" Not Necessary to Act.—It is not necessary that an act should use the word "appropriate" and when it fixes the amount to be paid out of the treasury to the claimant, and directs how it shall be paid, this is sufficient. *Id.* ..... 560
3. Allowing On Account of Public Services.—An act allowing a pension on account of public services is not invalid because such persons are put upon a different footing from other citizens. *Id.* .. 560

**PERSONAL INJURIES**—See Damages; Limitation, 3; Master and Servant; Railroads.

**PERSONAL REPRESENTATIVES**—See Executors and Administrators.

**PLACE**—Law of—See Action, 1.

**PLEADING**—See Damages; Fraud; Appeal; Land; Taxation, 9; Indictment, 3; Judgment, 9; Libel and Slander—

1. Pleading—Defect—When Cured by a Verdict.—The omission of a fact essential to a cause of action will not be cured by the verdict, when there is no admission or proof of the fact, nor submission of the question to the jury. *Connecticut Fire Insurance Company v. Moore.*..... 18
2. Answer—Two Defenses in One Paragraph—Demurrer—Where a paragraph of an answer contains two defenses, one of which is demurrable and the other not, it is error to sustain a demurrer to the paragraph as a whole. *Illinois Central Railroad Company v. Edelen* ..... 78
3. Lost Time—Defective Pleading—Introduction of Evidence Without Objection.—When lost time is pleaded, but in a defective manner, and there is no motion to make the petition more specific, and evidence on the question is heard without objection, the adverse party will not be heard, after the court has properly instructed the jury and a verdict has been returned, to complain of the admission of the evidence and the instruction based on it. The error of the court in so instructing the jury will be deemed to be waived. *Louisville & Nashville Railroad Company v. Miller.*..... 236
4. Amended Answer—Refusal—Abuse of Discretion.—The refusal of the trial court to permit the filing of an amended answer offered during the progress of the trial which in effect changes the defense and is not verified, and no reason is shown why it was not previously filed, is not an abuse of his discretion. *Id.* .. 236
5. Possession of Streets.—Where the petition of a municipality alleged ownership and exclusive control over a street which

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- it had so held for the benefit of the public, generally, for fifty years, stated a cause of action for injunctive process to require the defendant to remove its obstructions from the street. *Keystone Commercial Company v. City of Maysville*.... 240
6. Petition—Amended Petition.—It was not error to permit an amended petition to be filed, the allegations of which might properly have been set up in the original petition, where a sufficient time elapsed after its filing to allow the opposite party to prepare and present his defense thereto. *Louisville & Nashville Company v. Parks' Admr.*..... 269
7. Denial That Plaintiff is Corporation—Matter in Abatement.—A denial that the plaintiff is a corporation presents a matter in abatement which should be disposed of in the circuit court, and if that court is not called to pass upon the matter it will not be considered on appeal. *Higdon v. Wayne County Security Company* ..... 337
8. Consolidated Actions—Defect in Pleading Supplied by Others.—Where several causes of action between the same parties are consolidated, an allegation defectively stated in or totally omitted from one of the pleadings may be supplied by the averments contained in another, and a defect in the pleadings will be held to exist only where, considering them as a whole, a material averment is found to be omitted. *Von Cotzhausen v. Barker* .. - - - - - 624
9. Supplying Lost Pleadings—Trial.—When the pleadings in an action are lost, it is improper for the court to compel one of the parties to try the case until the pleadings are supplied or found. *Williams v. Lawson*..... 707
10. Demurrer.—Upon demurrer the truth of the allegations of the pleading in question are admitted by the demurrer for the purpose of testing its sufficiency. *International Harvester Company v. Commonwealth* ..... 838

PLEDGES—See Sureties.

POLICE REGULATIONS—See Nuisance.

POLICY—See Insurance, Life.

POOLS—See Trusts.

POWERS—See Corporations; Mortgages.

PRACTICE—See Appeal; Evidence, 1—

1. Right of Court to Set Aside Consent Orders and Judgments.—When the ends of justice require it, the court in which an order or judgment is entered, although it be by consent, may set it aside upon the motion of either of the parties if the

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- motion is made while the court has control of the order or judgment, but before the court sets aside a consent order or judgment the party asking that it be done should present good and sufficient reasons therefor. *First National Bank of Louisville v. Bickel, et al.; Same v. Same*..... 11
2. Civil Code—Section 333—Construction of—Waiver.—Section 333 of the civil code providing in substance that objections and exceptions must be made and taken by a complaining party before he will be heard afterwards to object to an order or ruling of the court, do not apply with the same binding force in the court in which the ruling or order is made as they do in this court. The court in which the order or judgment is made may for good reasons set it aside although it is entered by consent or without objection; but a party who brings his case to this court cannot avail himself here of erroneous rulings or orders made in the lower court unless he has, in the manner pointed out in section 333, saved an exception or an objection to the order or ruling he complains of. *Id.* .. 11

PRESUMPTIONS—See Drainage; Trial.

PRIMARY ELECTIONS—See Elections.

## PRINCIPAL AND AGENT—

Personal Judgment Against Agent—When Allowed.—Where a corporation, for the purpose of evading the corporation laws of this State, turns over to its president certain livestock, with authority to make contracts with reference thereto, and he, in his individual capacity, contracts for their keep, he thereby becomes personally liable on the contract. *Von Cotzhausen v. Barker* .. 162

## PROCESS—

1. Non-resident Doing Business in This State—Service Upon Agent or Manager.—Under subsection six of section fifty-one of the code, authorizing service of summons upon the manager or agent of a non-resident doing business in this State, it is doubtful if a non-resident, who only collects rents from property owned by him in this state and gives to the property such attention as an owner usually does, is doing business in this State within the meaning of this section. *Lagerwahl v. White*..... 162
2. Service as Authorized by Section 56 of the Civil Code—Effect of.—When a non-resident defendant has been summoned as provided in section 56 of the code, his property in this State, upon which the plaintiff has a contract, attachment, or other statutory lien, may be subjected to the payment of the plaintiff's debt. *Id.* ..... 163

**PUBLIC POLICY—See Municipal Corporations, 8.**

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**How Expressed.**—The public policy of a State is expressed in its Constitution and Statutes, and in its common law as found in the opinions of its court of last resort; and if the Constitution or Statutes speak upon a subject, the public policy of the State is fixed to that extent. *Gathright, et al. v. H. M. Byllesby & Company, et al.*..... 107

**PUBLIC RECORDS—See Mandamus.****PUBLIC ROADS—**

**Contract to Keep in Repair—Order of Fiscal Court Directing County Attorney as Commissioner to Make Contract to Maintain Roads—Void Contract—Attempted Ratification.**—The fiscal court has no power to delegate to an agent the authority to do anything which involves the exercise of a discretion which by law is confided to it, and where a fiscal court by an order directed a commissioner to make a contract for maintaining public roads, which order contemplated the exercise of his own judgment and discretion, it was void. Nor could the fiscal court delegate authority to the commissioner to approve the bond of the contractor, for the acceptance of the bond necessarily involves a discretion. The only way in which the fiscal court can act is through its orders duly recorded in the manner provided by law. *O'Kelly, et al. v. Lockwood, et al.* ..... 544

**PUBLIC SERVICES—See Pensions.****QUESTION FOR JURY—See Insurance, Life.****RAILROADS—See Carriers; Contracts, 12-14; Evidence, 12—**

1. **Crossings—Obstruction of View—Negligence.**—It is negligence on the part of a railroad company to permit its right of way near a crossing to become foul with vegetation and underbrush so as to obscure the view of travelers upon the highway. *Louisville & Nashville Railroad Company v. Parks' Admr.* .. .. 269
2. **Evidence—Competency.**—Evidence as to the growth of vegetation, and underbrush on a highway near a crossing is competent, in an action for injury at such crossings, as tending to show the dangerous nature of the crossings and the duty of the railroad company to employ signals, in addition to those required by statute, to warn the public of the approach of its trains. *Id.* .. .. 269
3. **Appeal—Review—Witnesses—Number and Credibility—Evidence.**—While the numerical superiority of the witnesses is with appellant, their credibility is for the jury; although

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- the weight of the evidence is with appellant, if its preponderance is not overwhelming in character, the verdict will not be disturbed. *Id.* ..... 262
4. Electric Railroad—Injury to Conductor—When Not Required to Anticipate Presence of Pole.—A conductor upon an electric line is not required to anticipate that a pole has been set so close to the track as to endanger him in the ordinary discharge of his duties and he does not assume the risk unless he knows the dangerous proximity of the pole. *Louisville & Interurban Railroad Co. v. Hardin's Admr.*..... 232
  5. Blocking Frogs.—Under section 780 of the Kentucky Statutes, which requires every railroad company to block the frogs on its track, the statute is violated when the company fails to block any one of its frogs. *Louisville & Nashville Railroad Company v. Commonwealth* ..... 293
  6. Act Requiring Trains to Stop at Stations Where a Penitentiary is Located—When Such Act Invalid.—An act of the Legislature requiring all trains to stop at a station where there is a penitentiary of the State, is invalid as to interstate trains, when reasonable facilities are furnished at such station by other trains. *Illinois Central Railroad Company v. Commonwealth* - - ..... 332
  7. Act Regulating Service of.—An act requiring railroad companies to continue such service as they were then rendering at other points in the same county, regardless of the necessity for such service is invalid. *Id.* ..... 332
  8. Action for Personal Injuries—Evidence.—The statement of a witness on cross examination that the engineer from his cab could see the crossing where the injury occurred, means nothing more than one from the cab of the engine having an unobstructed view could have seen the crossing by the light of the engine's head light, and was not a contradiction of the engineer's statement that he could not see the crossing because of a curve, and was harmless from any view. *Cincinnati, New Orleans & Texas Pacific Railway Company v. Reed* 380
  9. Speed of Train—Negligence in Failing to Have Headlight or to Give Signals.—The right of recovery being based upon the negligence in failing to have a headlight, or to give the signals, the reference in the instruction to the speed of the train was not prejudicial. *Id.* ..... 381
  10. Action for Personal Injuries—Verdict—Evidence.—In an action against a railroad company for personal injuries, where the plaintiff's skull was fractured and a leg and arm broken, evidence examined and held that a verdict for \$6,000 is sustained by the evidence. *Id.*..... 381
  11. Trespasser—Lookout Duty.—A railroad company owes no lookout duty to a trespasser upon its yards, its only duty to

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- him being the duty of exercising ordinary care to protect him after his presence on the track is actually discovered. Southern Railway Company in Kentucky v. Sanders..... 421
12. Licensee—Lookout Duty.—If, however, a pedestrian is injured at a place where a large number of persons were accustomed to using the tracks and premises of the company, the person injured becomes a licensee, and the company owes him a lookout duty. Id. .... 421
13. Use of Yards by the Public.—Where there was evidence to show that the place in the yards of a railroad company where the appellee was injured, was used by the people generally as a passway, the question of the negligence of the company in failing to exercise a proper lookout duty was for the jury. Id... 421
14. Action for Killing of Live Stock at a Crossing—Presumption of Negligence.—In an action against a railroad company for the killing of live stock at a grade crossing, the burden being upon the company to overcome the presumption of negligence, and it having failed to show a compliance with section 786 of the Kentucky Statutes, that presumption was not overcome. Campbell v. Mobile & Ohio Railroad Company; Campbell v. Same .. 582
15. Negligence Imputed by Section 809 Ky. Stats.—Signals.—On the question of whether a railroad has relieved itself of the negligence imputed to it by section 809, Ky. Stats., where cattle are killed at a highway grade crossing, until it has shown that it gave the necessary signals as provided in section 786, there has been but one opinion by this court, and it seems to assume that where the company sought to overcome the prima facie case against it, that it must show that the signals for the crossing were given as required by the section. (See 22 R., 666). Id..... 582
16. Signals at Crossings—Section 786 Ky. Stats.—There is nothing in the language of section 786 of the Kentucky Statutes from which it might be inferred that its requirements were intended only for the protection of human beings; it is sufficiently broad to hold the company negligent for a failure to observe its provisions whether men or stock may be killed or injured at a grade crossing if its provisions are violated. Id. 582
17. Trespasser—Action for Damages—Evidence—Peremptory Instruction.—In an action by the administrator of a trespasser to recover damages for his death, based on the failure on the part of the engineer to use ordinary care to avoid injuring the decedent after his peril was discovered, evidence examined and held insufficient to take the case to the jury. Thompson's Administrator v. Illinois Central Railroad Company, et al. .... 820

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2. Contract With—Discretion—Review.—A county board may contract with the city board for the free tuition of the county pupils in the city high school, and in making such contracts the boards are given a discretion which will not be reviewed by the courts when fairly exercised. Id. .... 309
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5. Exemption From Municipal Taxation Does Not Exempt From School Tax.—An ordinance enacted pursuant to constitutional and statutory provisions, authorizing municipalities to exempt from municipal taxation for five years manufacturing establishments, did not exempt them from the payment of school taxes levied by the municipal authorities for the benefit of the common school situated therein. Id. .... 316
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1. Action for—Laches—Evidence.—In an action to enforce specific performance of a contract to convey land, evidence examined and held that appellee was not guilty of such laches as to deprive him of the right to such relief. *Asher v. Simpson*..... 183
2. Contracts.—A purchaser having paid to the vendor a part of the purchase money, under a contract of sale of lands, and the vendor being in default as to conditions required of him by the agreement, is entitled to a specific performance of the contract of sale, even after expiration of the time limit for closing the contract. *Golden v. Cornett, et al.*..... 438
3. Land—Contract of Sale—Option—Unilateral Contract—Time.—A contract by which the parties of the first part sell and, agree to convey certain land in consideration of a cash payment of \$100 on the first payment of \$5 per acre, the balance to be paid twelve months from date, and when the amount of land is ascertained and conveyance made, and whereunder the grantee, at any time, has the right to surrender the agreement upon the payment of the sum of \$10 and the forfeiture of the

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\$100 cash payment, and be released from all liability under the agreement, is unilateral, and more nearly akin to an option than an executory contract of sale, since the grantee has the right, at any time, to elect whether or not he will take the land. Under such a contract time is of the essence, and where the time for performance is not definitely fixed, the grantee must exercise his right of election under the contract and demand performance within a reasonable time; and where neither demand is made nor suit for specific performance brought until after the lapse of eight years from the time the contract is executed, specific performance will not be decreed. Heydrick v. Dickey, et al. .... 475

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2. Construction.—It is a well known rule of law that when a statute has created a right and provided a remedy for the enforcement of that right, the claimant of such right must pursue the remedy the statute prescribes to the exclusion of all other remedies. Hager, Clerk v. Robinson; Same v. Turner, et al. .. 490

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STREAMS—OBSTRUCTION OF—See Damages, 4-5; Municipal Corporations, 21.

STREETS—See Municipal Corporations; Pleading, 5; Deeds, 9—

1. Right of Abutting Owner to Obstruct.—An abutting owner may in the conduct of his business or in the improvement of his property, temporarily obstruct a part of the adjacent street, if the obstruction does not unreasonably interfere with the right of the public to the use of the street. *Stratton & Terstegge Company v. Meriwether* ..... 839
2. Obstruction by Abutter.—The obstruction of a street by an abutting owner must be temporary in its nature and such as is reasonably necessary for the transaction of business or the enjoyment of the premises, and the obstruction must also be reasonable with reference to the right of the public. If an obstruction continues for such a period as to amount to an unreasonable interference with the public travel, it is unlawful and a nuisance. The question whether an obstruction is allowable or a nuisance is generally a question of fact to be determined by the facts of each particular case. *Id.*..... 840
3. Obstruction—Facts of This Case.—S. & T. owned large factory buildings on each side of a narrow street on which a railroad track was laid so that cars loaded with freight for use in the factory might be hauled on the street to a point opposite the door of the factory and there unloaded. For the purpose of unloading cars so placed, S. & T. put temporary supports in the street, and on these supports laid planks reaching from the factory door to the car door. These planks so placed completely obstructed the street, and it would be so constructed from periods of two to eight hours. Held that such an obstruction was unlawful and a nuisance, although the hands unloading the car were instructed to remove the planks and afford free passageway to travelers when so requested. *Id.*..... 840

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**Personal Injury—Instruction.**—It is error to give an instruction so general and abstract in form as to make the jury the judges of both the law and facts. *Pack v. Camden Interstate Railway Company* - ..... 535

**SUBMISSION—See Action.**

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**SUPERSEDEAS—See Appeal; Bonds.**

**SURETIES—See Bonds; Indemnity—**

**Mortgages—Pledges—Disposition of Proceeds.**—Where a debtor executes to his surety a mortgage and also assigns policies of life insurance to him to indemnify him against loss by reason of his suretyship and to secure the payment of indebtedness then existing between him and his surety, the proceeds of the policies of insurance should be applied, first to the payment of the mortgage debt, and second, to the discharge of any indebtedness of the principal to the surety existing at the time of the assignment of the policies. *Ward, et al. v. Ward*..... 355

**SURVIVOR—See Executions.**

**TAXATION—See Schools and School Districts; Contracts, 12-14; Vendor and Purchaser—**

1. **Assessment of Omitted Property—Proceeding by Revenue Agent to Collect School Taxes—Motion for Rule Against Sheriff to Show Cause Why He Had Not Collected School Taxes—Refusal of Rule.**—Following proceedings involving litigation in the Jefferson County Court, the Jefferson Circuit Court, the Court of Appeals, and the Supreme Court of the United States, a judgment was finally entered in December, 1911, wherein certain property of appellee was assessed for taxation for the years 1907 and 1908, and in March, 1912, an order was entered reciting satisfaction in full of the judgment. There was no mention in the pleadings indicating a purpose to collect school taxes. *Commonwealth, By, et al. v. Southern Pacific Company, et al.* ..... 41
2. In February of this year the revenue agents who had originally instituted the action, filed affidavits that appellee company was a resident of school district 46 of Jefferson County, and asked a rule against the sheriff of the county to show cause why he had not collected school taxes on the omitted property of the company. Upon notice to the company and the sheriff of the motion, the company did not respond, but the



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- sheriff filed a response admitting the domicile of the company to be in the school district, that it was liable for the taxes and joined with plaintiffs in asking a modification of the judgment so as to authorize him to distrain for the taxes. Upon appeal from the judgment overruling the motion, Held, that the revenue agents had no such interest in the collection of the school taxes as authorized them to enter these motions, it did not appear that the company was a resident of any particular school district; that it had had its day in court on the question of its residence in the district, or whether its property was liable to assessment therein for school purposes. *Id.* ..... 41
3. School Taxes—Section 4260 Ky. Stats., Does Not Embrace School Taxes.—The "State taxes" referred to in section 4260 Kentucky Statutes, are only such as go into the State Treasury when collected, and it is not intended to embrace school taxes which never reach the State Treasury. *Id.*..... 42
4. School Taxes—Duty of School Authorities to Collect—When any Taxpayer May Proceed to Have School Tax Collected.—If the school taxes are due for the years named, it is the duty of the school authorities of the district to take such steps as may be necessary to require the proper officer to collect them; and if the school authorities have failed, or refused to do so, it is within the power of any taxpayer of the district to resort to that remedy. *Id.*..... 42
5. Residence of One for Taxation.—A man's residence for taxation is where he really resides, and a verdict finding his residence where he spent most of his time will not be disturbed, although he declared his residence was elsewhere. *Graves, Admr. v. City of Georgetown* ..... 207
6. Listing Omitted Property—Appointment of Supervisors by Council—Vote of Council.—In listing omitted property from taxation under section 3542 Ky. Stats., the vote of the council need not be taken by yeas and nays and recorded in the journal. *Id.* .. ..... 207
7. Tangible Personal Property—When Subject to City Taxes.—Under section 4025 of the Kentucky Statutes, tangible personal property is subject to city taxes when it has established a taxable situs based on the actual situation of the property in the city, and whether tangible personal property has established a taxable situs or not depends on the facts of each case. *City of Paris v. The Burley Tobacco Society, et al.*..... 320
8. Claimant or Bailee in Possession Liable for.—Under section 4023 of the Kentucky Statutes, the claimant or bailee in possession of property is liable for the taxes thereon. *Id.*..... 321
9. Sufficiency of Petition to Enforce Collection of.—Where tangible personal property was assessed for city taxation and afterwards a suit was brought to enforce collection of the taxes so assessed, the petition on its face, which charged in

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- effect that the title and possession of the property sought to be assessed was in the city in the hands of an agent or bailee, stated a cause of action sufficient to require a defense showing how the tobacco was held by the agent and how long it had been and would be within the City. *Id.*..... 321
10. License Tax on Ice Factories—Proceeding by Revenue Agent—Construction of Statute.—In a proceeding by a Revenue Agent against appellant whose business is that of manufacturing ice and conducting a cold storage business, seeking to tax its total capital stock at the rate of thirty cents on each \$1,000 thereof, under the provisions of the Act of 1906, Held, Under the provisions of section 4224 of the Kentucky Statutes, which is the general law fixing license taxes, appellant is liable to pay a license tax on each of its ice factories, and as alleged in its answer it does pay the same; and if its sole business was the manufacture and sale of ice, under the express provision of section 4189a, of the Kentucky Statutes, it would be wholly excepted out of the provision requiring the payment of a license tax on its capital stock. It would be doing violence to the very plain provisions of that section to say that it was liable for the payment of such license tax on its capital stock which is employed by it in the manufacture and sale of ice. *Merchants Ice & Cold Storage Company v Commonwealth, By, et al.* .. 452
11. Revenue Statutes—Construction of.—Courts will not construe revenue statutes so as to bring about double taxation when any other reasonable interpretation can be put upon them. *Id.* .. 453
12. Where a Manufacturing Company Both Manufactures Ice and Conducts Cold Storage Business—Payment of License Taxes.—Where a manufacturing company conducts both an ice manufacturing business and a cold storage business, and pays a license tax only on its ice factories, it is liable for the payment of a license tax on so much of its capital stock as is employed, or used by it in the conduct of its cold storage business. *Id.* .. 453
13. Assessment of Omitted Property.—The "omitted property" contemplated by our assessment statutes is property which is not assessed at all; they do not mean that property which by mistake has been apportioned to the wrong subdivision or municipality may be treated as omitted "property" by the county or subdivision where it should have been assessed. *Commonwealth, By, et al. v. Ashland Coal & Iron Railway Company* .. 673
14. Assessment of Omitted Property—Remedy.—In such cases the county or subdivision so wronged may appear before the board authorized to make the assessment and have the error corrected, and if that body refuses it may be required to do so by mandamus. *Id.* .. 674

TEACHER—See Schools and School Districts.

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TELEGRAPH AND TELEPHONE COMPANIES—See Highways—

Power of Operator to Contract—Contract to Deliver Oral Message—Actual Authority—Apparent Authority—Rule.—A rule of a telephone company forbidding operators to deliver oral messages is reasonable, but the publication of the rule in books issued to its subscribers is not notice to one not a subscriber, and a contract with a non-subscriber made by an operator to deliver an oral message upon the payment of a fee of 25 cents, being within the scope of his apparent authority, is binding on the company in the absence of notice to the sender of any limitation upon the power of the operator to contract. *Cumberland Telephone & Telegraph Company v. Brandon*..... 644

TENANCY IN COMMON—See Adverse Possession; Limitation, Partition.

THREATS—See Homicide.

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TRESPASS—See Land—

1. Action for—Title—Evidence—Finding of Chancellor.—In an action to enjoin the commission of trespass committed by cutting and removing timber from land, evidence examined and held to support the finding of the chancellor that the plaintiffs did not own the land on which the timber in question stood. *Roberts, et al. v. Calhoun*..... 211
2. Injury to Trees—Action for Trespass.—If a tree standing upon the line between adjoining lots is injured or destroyed by one of the owners, without the consent of the other, trespass will lie against the wrongdoer in favor of the joint owner without whose consent the tree was destroyed or injured. *Blalock, et al. v. Atwood*..... 395
3. Exemplary Damages.—In such case, if the trespass be wantonly or maliciously committed, exemplary damages, in addition to the actual loss inflicted, may be recovered of the wrongdoer. *Id.* .. 395

TRESPASSERS—See Railroads.

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TRIAL—See Criminal Law; Homicide; Jury; Pleading—

1. Jury Trial in Equitable Actions.—Section 12 of the Civil Code of Practice providing for a trial by jury of issues of fact in an equitable action has no application where the pleadings fail to make an issue. *Keystone Commercial Company v. City of Maysville* . . . . . 239
2. Sufficiency of Evidence.—Where the answer fails to make an issue, the alleged insufficiency of the evidence to sustain the judgment is not open to review. *Id.* . . . . . 240
3. Improper Arguments.—Comments by counsel in argument to the jury not supported by the record should be excluded from consideration by the jury, and in addition the jury should be told that the argument is improper. If the argument is prejudicial, a verdict obtained by counsel so offending should be set aside. *Cincinnati, New Orleans & Texas Pacific Railway Company v. Martin* . . . . . 341
4. Improper Argument—Objection to—How Taken.—When improper argument of counsel for the successful party is relied on as a ground for reversal, the objectionable argument should be set out in the bill of exceptions, which should also show that objection was made to it at the time. *Chesapeake & Ohio Railway Company v. Stapleton, et al.* . . . . . 351
5. Continuance—Discretion of Court.—In civil actions the matter of granting a continuance is largely in the discretion of the trial court, and when the affidavit for a continuance is remitted to be read as the deposition of the absent witness, it is only in very exceptional cases that the refusal to grant a continuance will be error. *Id.* . . . . . 351
6. Argument of Counsel—Comments Not Supported by Record.—Where a lawyer, in argument to the jury, makes statements not supported by the record, the trial judge should, without waiting for objections, promptly reprimand the offending counsel, charge the jury to disregard his statements, and if the comments are of such prejudicial nature as improperly to influence the jury, he should set aside any verdict, rendered in favor of such counsel. *Owensboro Shovel & Tool Company v. Moore* . . . . . 431
7. Instructions—Measure of Damages.—In an action for damages for breach of contract to do a specific thing, at an agreed price, the measure of damages is the reasonable profits the party would have made, had he been permitted to complete the contract. *Id.* . . . . . 431
8. Setting Aside Verdict—New Trial—Discretion of Judge.—A judgment setting aside a verdict and awarding a new trial will not be reversed unless it appears that there was an abuse of discretion on the part of the trial court. *Pack v. Camden Interstate Railway Company* . . . . . 535

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9. Special Judge—Presumption that Governor Acted Properly in Appointing.—It will be presumed that the Governor acted properly in sending a special judge to try a case nothing else appearing. Ordinarily the clerk may notify the Governor when notified by one of the parties that the parties cannot agree on an attorney to preside. *Price v. Russell*; *Coleman v. Morgan* .. . 834

## TRUSTS—

- Pools—Subject to Fine Only.—Under the Act of 1906 (Kentucky Statutes, section 3941a), known as the "Pooling Statute," and which amended the Act of 1890 (Kentucky Statutes, 3915 to 3941 inclusive) against "Pools, Trusts and Conspiracies," there is no prohibition against the formation of trusts or pools in Kentucky, since the Act of 1906 merely provides a fine against trusts and pools in case they sell their products above or below their real value. *Gathright, et al. v. Byllesby & Co., et al.* ..... 106

UNDUE INFLUENCE—See Wills.

UNILATERAL CONTRACTS—See Specific Performance.

## USURY—

- Right to Plead.—The right to plead usury is personal, and the borrower may renounce the benefit of the usury statutes if he chooses and refuse to avail himself of their protection. *Marcum's Admr., et al. v. Marcum*..... 402

VACATION—See Bill of Exceptions; Judgment.

VARIANCE—See Judgment, 6.

## VENDOR AND PURCHASER—See Lis Pendens; Easements—

1. Lien as Security for Purchase Price—Assignment of.—Where a vendor of real estate holds liens as security for the purchase price, upon two parcels of real estate—the lot sold by him and another his vendee had sold a third person, the lien retained upon which for unpaid purchase money, had been assigned to him—he had the right in one and the same action, to enforce both liens, and it was not error for the court in rendering judgment to direct that the lot sold by the vendor be first subjected to the payment of his debt. *Fain, et al. v. Heathman, et al.* ..... 174:
2. Lien For Purchase Money—Priority Over Mortgage Lien.—A lien retained in deed conveying land to secure unpaid balance of purchase money is superior to a mortgage lien of the same date. *Ward, et al. v. Ward*..... 355

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3. Pendency of Action to Settle Estate—Purchase from Heir.—Section 2084, Ky. Stats.—Under section 2084, Ky. Stats., one who purchases from an heir of an intestate pending an action to settle the intestate's estate brought within six months from the time the estate descended, steps in the shoes of the heir, and acquires no interest in the real estate where the debts of the intestate and the costs of administration equal the proceeds of its sale. *Robertson, et al. v. Hines, et al.*..... 364
4. Deed—Fraud—Right of Purchaser to Set Aside Prior Deed of Grantor on the Ground of Fraud.—An attorney who purchases from a grantor who had previously sold and conveyed the property, with notice of such prior deed, acquires no right to institute an action not authorized by his grantor, to set aside the former deed on the ground of fraud, and to prosecute such action in opposition to his grantor's wishes. *Stewart, et al. v. Stewart, et al.*..... 367
5. Contracts—Construction—Sale—Option.—An agreement providing for the transfer of title to certain lands, at a stipulated price, upon the ascertainment of the title and acreage, and payment of the purchase money, held to be a sale and not an option. *Golden v. Cornett, et al.*..... 438
6. Contracts—Rescission—Abandonment.—Acts of parties to a contract of sale of real estate, to constitute its abandonment, must be positive, unequivocal, and inconsistent with the continuance of the contract. *Id.*..... 438
7. Contracts—Condition Precedent—Rescission—Right of Vendor.—A provision in a contract of sale that vendor shall furnish to the purchaser his title papers and assist in tracing title to the lands thereby sold, is a condition precedent which must be performed, or offered to be performed, before vendor is entitled to rescind for failure of purchaser to ascertain acreage and pay balance of purchase price. *Id.*..... 438
8. Which to Pay Taxes.—Section 4023 of the Kentucky Statutes, which provides that if property be sold before February 1st, of the year in which the taxes are due and payable, it shall be the duty of the purchaser, in the absence of any contract to the contrary, to pay the taxes upon the property bought, applies to judicial sales, and embraces all annual taxes, including State, county and municipal taxes. *Crawford v. Wiedemann; Wiedemann v. Crawford* ..... 666
9. Statutes—Summary Remedy in Ascertainment of Taxes.—Section 989 of the Kentucky Statutes, which authorizes courts having a continuous session, in actions for the sale of real property, to determine summarily the amount of taxes upon the property to be sold, and to provide for the same in the judgment, or by a credit for such taxes upon the purchase price, is a remedial statute only, and is not inconsistent with or repealed by section 4023 of the Kentucky Statutes, which confers upon the purchaser of real-property the substantive

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- right of having the current taxes upon property bought by him credited upon his purchase price where the sale is made after February 1st of any year. *Id.*..... 666
10. Effect of Judicial Sale to Pay Purchase Price.—When land is sold to pay the purchase price, the effect of the sale is to divest the purchaser of any interest in the land, and if he remains in possession after the sale, his possession is not hostile to the possession of the purchaser at the judicial sale. *Jones, et al. v. Lickliter*..... 848

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1. Reversal of Judgment Because Excessive—New Trial—Evidence.—Where a judgment for \$6,800 was reversed because the verdict was excessive, and in the opinion certain instructions were directed to be given upon a new trial, the evidence upon the new trial being the same as on the former trial and the instructions given as directed, the verdict for \$2,500 will not be disturbed. *Louisville & Nashville Railroad Company v. Cox* ..... 100
2. Excessive.—In an action for damages for personal injury, evidence examined, and a verdict of \$1,000 held not excessive. *Louisville & Nashville Railroad Company v. Miller*..... 236
3. Wills.—The verdict of a jury sustaining a will will not be set aside as against the evidence, where it is not palpably contrary to the evidence. *Brewer v. Brewer, et al.*..... 662
4. Excessive.—Facts considered, and verdict of \$12,500 held not excessive. *Chicago, St. Louis & New Orleans Railroad Company, et al. v. Benedict's Administrator*..... 675
5. When Will Not Be Disturbed in Criminal Case.—The verdict of a jury will not be disturbed in a criminal case, unless palpably against the evidence. *Johnson v. Commonwealth*..... 742
6. Signature of Juror by Mark.—A verdict returned by nine jurors is valid, although one of the jurors made his signature by making his mark, and his signature was not witnessed. (For original opinion see 154 Ky., 649). *Pugh v. Jackson, Jr.* 772
7. Verdict in Criminal Case Will Not Be Disturbed Unless Palpably Against Evidence.—The court will not disturb a verdict in a criminal case unless palpably against the evidence and under this rule, a verdict finding the defendant guilty of stealing money will not be disturbed when based on circumstances on which the conclusion of the jury was not palpably unwarranted. *Davis v. Commonwealth*..... 774

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WILLS—See Evidence; Verdict—

1. Contest—Burden of Proof.—The rule is well settled that after due execution of a will is proved by the proponent the burden of showing that the instrument is invalid, upon the ground that it was procured by the exercise of undue influence, is upon the contestants; and this must be shown by evidence at least tending to establish that undue influence was exercised upon the testator. *Crump, et al. v. Chenault, et al.* ..... 187
2. Contest—Undue Influence.—In order to establish undue influence in the execution of a will, it is not sufficient that it be shown that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised; some evidence must be adduced showing that such influence was exercised. *Id.* ..... 187
3. Construction of.—A devise by a testator, after payment of his debts, of all his estate to his wife for life, with remainder to his daughter, with a proviso, that if the wife remarried the property should be divided between her and the daughter, as the law directs, but that if the daughter should die "without heirs," the estate should go to the testator's "family relations," after the death of the wife, gave to the daughter a defeasible fee in the property devised, subject to the life estate of the widow and subject to be defeated in the event, she (the daughter) should die without children, before the termination of the particular estate; that is, before the death of the widow. As the daughter survived the widow, her title became an absolute or fee simple title. *Anderson, et al. v. Herring, et al.* 289
4. Construction of.—It is a well recognized rule in the construction of wills, that where an estate is devised to one for life, with remainder to another, with the further provision that, if the remaindermen should die without children or issue, then to a third person, the words, "dying without children or issue," are restricted to the death of the remainderman before the termination of the particular estate. *Id.* ..... 289



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5. Direction to Sell Land—Sale by Executor—When Should Be Set Aside.—Where the will directs so much of a tract sold as is necessary to pay the debts, and from the shape and size of the tract it may be presumed to be divisible without materially impairing its value, a sale by the executor of the whole tract for \$700, when the debts amounted to only \$200, should be set aside, the purchaser having notice of the facts. *Tarpy, et al. v. Lexington & Eastern Railroad Company*..... 345
6. Construction.—The testator directed that the remainder of his estate be equally divided among his children. He then added the following clause: "I also entail the land on and during their natural life with the right to will the same." Held, that the latter provision being meaningless and unintelligible did not limit, diminish or qualify the estate devised, and that the children of the testator acquired a fee under the will. *Forquer v. Bovard, et al.*..... 377
7. Construction of.—In the construction of wills the entire instrument must be taken into consideration in order to ascertain the meaning and purpose of the testator; and in construing a devise the word "or" will be changed to "and" when necessary to effectuate the true intention of the testator. *Hayes, et al. v. Hayes, et al.*..... 729
8. Construction of.—The word "heirs" and "their heirs" are technically words of limitation, but when used in wills they will be construed as words of purchase when it sufficiently appears that the term is used to designate a particular person or persons who may stand in that relation at the happening of a certain event, or at a certain period, and not to the whole line of heirs in succession. *Id.*..... 729
9. Rules for Interpretation of.—The three following general rules are deduced from the decisions of the Kentucky Court of Appeals for the interpretation of wills:  
 First: Where there is a devise by a father or mother to a son, daughter, or blood relation, in which the language "to him and his children forever" is used the word "children" has been construed as meaning "heirs," and they take no interest in the property devised:  
 Second: In a devise to a blood relation and his children, where the word "forever" is not used following the word "children," the children take a fee subject to the life estate of the parent; and  
 Third: In devises by a husband to his wife and her children, the children take the fee and the parent the life estate. *Id.* .. 729
10. Construction of.—Other clauses of a will frequently throw light upon the clause submitted for construction, and in such cases the court can be governed by no fixed rule, but must determine by the language used in the will, as a whole, the character of the estate devised. *Id.*..... 729

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11. Construction of.—A will which devises all of the testator's property to his wife for life, with remainder to his daughter Alice, "or her heirs," Pauline, John, Elva, Richard, William and Margaret, and in subsequent clauses required the real estate to be held intact until Pauline became twenty-one years of age, when the property should be sold and one-sixth thereof delivered to Pauline, and the remaining five-sixths to be divided among the other five heirs as each attained his majority, Alice took a life estate, with the remainder to her five children in fee. *Id.*..... 729

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2. Cases in Which Court of Appeals Will Issue Temporary Writ.—The court will issue a temporary writ in such cases where this is necessary in order that an appeal prayed and granted, may not be abortive, there being no other remedy. *Id.*..... 198

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